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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GERONIMO VILLEGAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether respondent was properly convicted under the Clean Water Act, 33 U.S.C. 1311(a) and 1319(c), for taking vials filled with human blood from his car and discharging those vials into navigable waters.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 3 F.3d 643. The opinion of the district court (App., *infra*, 34a-53a) is reported at 784 F. Supp. 6.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1993. A petition for rehearing was denied on December 3, 1993. App., *infra*, 72a-73a. On February 22, 1994, Justice Thomas extended the time

for filing a petition for a writ of certiorari to and including April 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Sections 301, 309 and 502 of the Clean Water Act, 33 U.S.C. 1311, 1319 and 1362, are set forth at App., *infra*, 74a-81a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, respondent was convicted of knowingly discharging pollutants (vials filled with human blood) into navigable waters, in violation of 33 U.S.C. 1311(a) and 1319(c)(2) (Counts 2 and 4), and placing others in imminent danger of death or serious bodily injury by knowingly discharging pollutants into navigable waters, in violation of 33 U.S.C. 1311(a) and 1319(c)(3) (Counts 1 and 3). The district court granted a judgment of acquittal on the two knowing endangerment counts. The court of appeals reversed the remaining counts.

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that goal, Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the "discharge of any pollutant" into navigable waters of the United States except in accordance with a permit issued under Section 402 or 404 of the Act, 33 U.S.C. 1342, 1344. The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12).

The term "point source" is defined to mean

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. 1362(14). Any person who knowingly discharges a pollutant into navigable waters of the United States without authorization in a permit is subject to criminal penalties under Section 309(c)(2) of the Act, 33 U.S.C. 1319(c)(2). Additional penalties attach under Section 309(c)(3) of the Act, 33 U.S.C. 1319(c)(3), if the discharge places others in imminent danger of death or serious bodily injury.

2. Respondent was the vice-president and co-owner of Plaza Health Laboratories, Inc. (Plaza), a blood testing laboratory in Brooklyn, New York. On at least two separate occasions, between April and September 1988, respondent transported in the trunk of his car hundreds of blood vials generated at Plaza to the Admirals Walk Condominium complex, located on the Hudson River in Edgewater, New Jersey. Once there, respondent took the vials out of his trunk and disposed of them in the Hudson River. App., *infra*, 2a, 35a.

In May 1988, school children on a Staten Island field trip found numerous glass vials containing human blood washed up on the beach. City workers later discovered approximately 70 additional vials containing human blood scattered along the shoreline and

floating in the incoming tide; the broken remains of other vials were found among clusters of rocks in the shallow waters. Some of the vials contained blood infected with the hepatitis-B virus. App., *infra*, 2a, 34a-35a.

In September 1988, New Jersey authorities found at least one hundred blood vials floating in the Hudson River in front of the Admirals Walk Condominium complex. A plastic bag containing additional vials was found wedged into the rocks of the river bulkhead. Once again, some of the vials were found to contain blood infected with the hepatitis-B virus. Authorities traced all of the vials from both incidents to Plaza. When respondent was questioned, he admitted dumping blood vials into the bulkhead that separated his New Jersey condominium and the Hudson River. App., *infra*, 2a-3a, 35a.

3. Respondent was subsequently indicted under the Clean Water Act. He was charged in two counts with knowingly discharging a pollutant—*i.e.*, the vials filled with human blood. Based on the fact that some of the blood was contaminated with the hepatitis-B virus, he was also charged in two counts with placing others in imminent danger of death or serious bodily injury by the knowing discharge of a pollutant.

On the requirement that there be a "discharge from a point source"—an element of each of the charges against respondent—the district court instructed the jury that "[r]emoving pollutants from a container, and a vehicle is a container, parked next to a navigable body of water and physically throwing the * * * pollutant into the water constitutes a discharge from a point source." App., *infra*, 65a. The district court further explained that

> Congress chose to distinguish between "point sources" and "non-point sources" with the specific purpose of excluding various kinds of pollution runoff, that is, runoff produced principally by rainfall that cannot be traced to one polluter. Congress did not intend to exempt from regulation any activity that emits pollution from an identifiable point. Congress did not intend by the term "point source" to distinguish between a person who drives a truck to the edge of the Hudson River and dumps blood vials, clearly a point source, and a person who gets out of the truck, takes the vials from the truck, walks to the river's edge and dumps them from his hand.

Ibid. Respondent was convicted on all counts.

Following the verdict, the district court entered a judgment of acquittal on the two knowing endangerment charges, holding that there was insufficient evidence that respondent's conduct created an imminent danger of hepatitis contagion. App., *infra*, 52a-53a. The court rejected, however, respondent's broader claim that he was entitled to acquittal on all charges, because "neither [respondent] nor his vehicle was a 'point source.'" Respondent's Memorandum in Support of Motion for Post-Trial Judgment of Acquittal 19. Respondent's contention was based on the theory that the Act is concerned only with discharges that arise from "fixed facilities" or "plants" that are ongoing sources of pollution. *Id.* at 20; see also App., *infra*, 42a n.2. The court explained that the statutory definition of "point source" is "emphatically inclusive, as reflected in the words 'any,' 'discernible' and 'not limited to.'" *Id.* at 38a-39a. In addition, the court noted that the use of the word "conveyance" in the

statutory definition "establishes that Congress had an expansive vision of what would constitute a point source," since "[t]he word conveyance is defined simply as 'a means or way of conveying.' " *Id.* at 39a. Finally, the court rejected respondent's reliance on the rule of lenity, holding that the rule should not be invoked to defeat the obvious purpose of the Act. *Id.* at 37a-38a, citing *United States* v. *Standard Oil Co.*, 384 U.S. 224, 225 (1966). Respondent was sentenced to twelve months' imprisonment, to be followed by one year of supervised release. App., *infra*, 3a-4a.

4. A divided panel of the court of appeals reversed respondent's remaining convictions, holding that there was no discharge from a "point source," because "th[e] statute was never designed to address the random, individual polluter like [respondent]." App., *infra*, 7a. The court explained that it "is evident from a perusal of its many sections" that the Clean Water Act "generally targets industrial and municipal sources of pollutants," since "the term 'point source' is used throughout the statute, but invariably in sentences referencing industrial or municipal discharges." *Id.* at 8a. The court also relied on the legislative history of the Act, which it interpreted to support its view that Congress adopted the "point source" concept simply "as a means of identifying industrial polluters." *Id.* at 10a.

While the court acknowledged that lower courts have uniformly construed "point source" more broadly, the court noted that those cases "have done so in civil-penalty or licensing settings, where greater flexibility of interpretation * * * is permitted, and the rule of lenity does not protect a defendant against statutory ambiguities." App., *infra*, 13a. Here, the court believed, "the term 'point source' as

applied to a human being is at best ambiguous," *id.* at 15a, and the rule of lenity required that the ambiguity be resolved in respondent's favor. "Compelled by the rule of lenity," the court reversed the convictions and remanded "with a direction to dismiss the indictment." *Id.* at 17a.

Judge Oakes dissented. Judge Oakes concluded that the Clean Water Act is not ambiguous "with respect to an individual physically disposing of medical wastes, in quantity, directly into navigable waters, by means of a controllable, discrete conveyance and course of action." App., *infra*, 31a. Judge Oakes noted that "the term 'point source' has been broadly construed to apply to a wide range of polluting techniques, so long as the pollutants involved are not just humanmade, but reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort." *Id.* at 21a. Judge Oakes explained:

> I doubt that Congress would have regarded an army of men and women throwing industrial waste from trucks into a stream as exempt from the statute. Since the Act contains no exemption for de minim[i]s violations * * * I cannot see that one man throwing one day's worth of medical waste into the ocean differs * * *. A different reading would encourage corporations perfectly capable of abiding by the Clean Water Act's requirements to ask their employees to stand between the company trucks and the sea, thereby transforming point source pollution (dumping from trucks) into nonpoint source pollution (dumping by hand). Such a method is controllable, easily identifiable, and inexcusable. To call it

> nonpoint source pollution is to read a technical exception into a statute which attempts to define in broad terms an activity which may be conducted in many different ways.

Id. at 27a-28a. Because "the discharge was directly into water, and came from an identifiable point," *id.* at 26a, and respondent had fair warning that his actions were illegal, *id.* at 32a-33a, Judge Oakes concluded that respondent's conduct was proscribed by the Clean Water Act. *Id.* at 28a-31a, 33a.[1]

REASONS FOR GRANTING THE PETITION

The court of appeals' conclusion that the Clean Water Act incorporates an "industrial or municipal pollution" requirement drastically erodes the protections of the Act. By mistaking the Act's breadth for ambiguity, the court of appeals has created a nontextual requirement that is, at best, elusive and incapable of principled administration by the courts or the government. Because the court of appeals' cramped reading of the Act conflicts with the Act's plain language and with the approach taken by other circuits, and because the scope of the Act is an issue

[1] In view of its conclusion that respondent's conduct involved no "point source," the majority found it unnecessary to reach the government's cross-appeal challenging the entry of a judgment of acquittal on the two knowing endangerment counts. App., *infra*, 16a-17a. Judge Oakes addressed the government's cross-appeal, and he agreed with the district court. *Id.* at 33a. Because the majority of the court of appeals has not yet addressed whether the evidence was sufficient to support a finding of "imminent danger," and because the majority may agree with the government's position on that issue if this Court decides the logically antecedent "point source" question in the government's favor, the question of the proper interpretation of the "imminent danger" requirement is not before this Court.

of exceptional public importance, this Court's review is warranted.

1. The court of appeals correctly recognized that respondent's conduct in driving to the edge of the Hudson River and depositing the vials in the river is proscribed by the Clean Water Act if it is a "discharge of a pollutant." The court, however, largely ignored the Act's broad definition of that phrase. The phrase "discharge of a pollutant" is defined to mean "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. 1362(12) (emphasis added). A point source, in turn, is

> *any* discernible, confined and discrete conveyance, *including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. 1362(14) (emphasis added). By repeatedly using the inclusive word "any," the Act clearly manifests an intent to embrace the totality of discharges from "discernible, confined and discrete conveyance[s] * * * from which pollutants are or may be discharged." The breadth of the Act's reach is confirmed by the statutory list of point sources, which Congress expressly made nonexhaustive. See *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). It is difficult to imagine a statutory definition less susceptible to a narrow interpretation, and it is clear that the automobile used by respondent to transport the blood to the bank

of the Hudson River meets that definition as a "conveyance." Having been instructed that respondent's car, when parked next to the river bank, met that definition, the jury properly found respondent guilty as charged.

2. In narrowing the scope of the statutory language, the court of appeals relied principally (App., *infra*, 8a-9a) on its conclusion that the phrase "point source" is used throughout the Act in contexts that evince Congress's concern with "industrial" or "municipal" pollution. The court believed that the legislative history of the Act evidences the same focus on "industrial" or "municipal" pollution, and that the "ambiguity" created by Congress's failure to advert specifically to the conduct at issue here warranted application of the rule of lenity. Each of those conclusions is unsound.

a. Because the term "point source" is expressly defined by the Act, the court of appeals erred in seeking to narrow its meaning by reference to various contexts in which the term is used in the Act, rather than faithfully applying the broad definition enacted by Congress. Respondent unquestionably took pollutants (vials filled with human blood) from a conveyance (his car) and added those pollutants to navigable waters (the Hudson River). No more is required for liability under the statutory definitions of "discharge of a pollutant" and "point source."[2]

[2] Indeed, even if the court of appeals were correct in its view that the Act's principal applications will arise in the context of "industrial" or "municipal" pollution, that fact would not serve to narrow the scope of the Act. That the statutory language can be read to *include* certain evils does not indicate that such language must be read to *exclude* other evils (such as dumping from a truck by hand) that also fall within the broad

The court of appeals nonetheless believed that Congress could not possibly have intended to include a human being as a "point source" under the Act. We believe that the district court correctly concluded that the Act's definition of "point source" is broad enough to embrace a human "conveyance" (App., *infra*, 40a), but that issue is not pertinent to the validity of respondent's conviction. As the court of appeals itself recognized (*id.* at 6a), the jury was instructed that respondent's *vehicle* was the statutory "conveyance." Only if the intervention of a human being between that conveyance and the water precludes conviction under the Clean Water Act as a matter of law, could the Second Circuit's decision be justified. The Second Circuit, however, cited no statutory language calling for that exception.[3]

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terms of the language chosen by Congress. See *Smith* v. *United States*, 113 S. Ct. 2050, 2055 (1993). Moreover, in this case the vials of blood that respondent conveyed were wastes generated by, and transported from, a commercial laboratory — a type of "industrial" source.

[3] Because respondent's jury was not instructed that a person can be a point source, that issue is logically relevant to the validity of his conviction only if the Act is read to require that the last chain in the link of conveyances *itself* be a "point source." While the court of appeals' entire analysis appears to be based on that assumption, nothing in the Act requires it. Whether or not respondent himself is a "point source," he clearly "added" a pollutant to the Hudson River "from" a "discernible, confined and discrete conveyance"— *viz.* his car.

While the court of appeals noted that the government urged in its briefing below that a human being *can* be a "point source," the court failed to appreciate that that argument was merely responsive to respondent's claim that he was entitled to a judgment *of acquittal*. If the Act is read to require that the last point in the chain that places pollutants in the water *itself*

b. As for legislative history, it is not the discussion of anticipated applications in the legislative history that delimits the scope of a statute, but rather the language actually enacted by Congress. See, *e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495 & n.13 (1985). As this Court has repeatedly emphasized, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988). See also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history").

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must be a "point source," it would follow that respondent's jury was not properly instructed, because the jury was told that respondent's vehicle (as opposed to respondent himself) was the statutory conveyance. But if the evidence introduced at trial was sufficient for a jury to find guilt under proper instructions (*i.e.*, instructions identifying respondent as the "point source"), that hypothetical error in the instructions would *at most* entitle respondent to a new trial (not an acquittal), and then only if the instruction error was not harmless, see *Pope* v. *Illinois*, 481 U.S. 497, 501-504 (1987). An outright acquittal would be warranted only if (i) the Act requires that the point source always be the last link in the chain of acts constituting the discharge of a pollutant, *and* (ii) a human being can never be a point source as a matter of law.

In sum, the court of appeals' ruling dismissing the indictment outright is based on two logically separate and independent errors. First, the court erred in its implicit assumption that there could be no discharge "from" the vehicle point source unless respondent is himself a "point source"—*i.e.*, it was error to assume that the Act requires that the last link in the chain of discharging a pollutant itself be a point source. Second, the court also erred in concluding that a human being cannot be a point source. Correction of either error is sufficient to overturn the judgment below.

Because the statutory language does not encompass the "industrial" or "municipal" pollution limitation adopted by the court of appeals, the failure of the legislative history specifically to advert to the application of the Act urged by the government cannot properly be used to create a non-textual exception not otherwise found in the statute.

In any event, to the extent the legislative history speaks to the issue at all, it undermines the conclusion reached by the court of appeals. As Judge Oakes noted in dissent, Congress recognized that pollution of navigable waterways can often result from diffuse precipitation, percolation, or runoff—*e.g.*, agricultural chemicals from farmlands and other substances washed by unchanneled rain into navigable waters. App., *infra*, 23a-24a; see also S. Rep. No. 50, 99th Cong., 1st Sess. 7-8, 33-43 (1985). Congress decided to leave regulation of such diffuse pollution initially to the States, and adopted the "point source" concept as a means of identifying pollution that may readily be attributed to a particular source and which is therefore subject to federal regulation. App., *infra*, 24a-25a. The source of respondent's pollution is easily identifiable and controllable, and that is all that the legislative history contemplates as necessary for its classification as a "point source."

c. As for the rule of lenity, this Court has emphasized repeatedly that that rule is not applicable unless there is a "grievous ambiguity" in the statute, *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even after a court has " 'seize[d] every thing from which aid can be derived' it is still 'left with an ambiguous statute.' " *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991), quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting

United States v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). A statute is not " 'ambiguous' for purposes of lenity merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government." *Moskal* v. *United States*, 498 U.S. at 108; *Smith* v. *United States*, 113 S. Ct. at 2059. Nor is a statute ambiguous for purposes of lenity merely because a particular application of clear statutory language was not contemplated by Congress; that a statute "has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 806 (1994), quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 499.

The court of appeals plainly disregarded those principles. The court's rule that the Clean Water Act ceases to apply when a human being is placed between the water and the conveyance loaded with pollutants is not even a possible *interpretation* of any statutory language. It is unalloyed speculation about the likely reach of legislative concerns—speculation that manifestly conflicts with broad, clear, and unambiguous statutory language. The comprehensiveness of the Act's definition of "point source" (see pages 3, 9, *supra*) leaves no doubt that the Act encompasses the conduct of which respondent was convicted—loading his car with medical waste products, driving his car to the water's edge, and dumping the wastes into the Hudson River.[4] The court of appeals therefore erred

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[4] Indeed, whether the vehicle's contents were dumped directly into the water from the vehicle or hand-carried for that purpose is no more material to the Act's obvious prohibitory aims than would be the extent to which hand carriage

in invoking lenity to place that conduct beyond the reach of the Act.

3. The court of appeals' decision conflicts with decisions from other circuits, which have recognized that the plain language of the Act embraces a broad array of polluting conduct that is logically indistinguishable from respondent's activities. In *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 922 (5th Cir. 1983), for example, the court concluded that bulldozers and backhoes used to effect a discharge into navigable waters are statutory "point sources." The fact that human intervention manifestly is necessary before a backhoe or a bulldozer can convey pollutants to navigable waters did not prevent the Fifth Circuit from applying the Clean Water Act as written. Other courts of appeals have similarly concluded that "it contravenes the intent of [the Clean Water Act] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point." *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (runoff collected by mining operation that escapes through fissure in berm or overflow of a wall is a discharge from a point source); see also *Sierra Club* v. *Abston Constr. Co.*, 620 F.2d 41, 47 (5th Cir. 1980) ("surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution"); *Barcelo* v. *Brown*, 478 F. Supp. 646, 664 (D.P.R. 1979) (release or firing of ordnance from aircraft is a discharge from a point source), aff'd in relevant part *sub nom. Romero-Barcelo* v. *Brown*, 643 F.2d 835,

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was used in loading the wastes into the vehicle in the first place.

861-862 (1st Cir. 1981), rev'd on other grounds, 456 U.S. 305 (1982).

The court of appeals recognized that its decision is inconsistent with the principles announced in those cases (App., *infra*, 13a-14a), but it believed that its decision created no inter-circuit conflict, because those cases were civil proceedings in which the rule of lenity is inapplicable. This Court's decisions, however, do not support the court of appeals' attempt to interpret the same statutory language differently depending on the civil or criminal nature of each particular case. On the contrary, this Court has repeatedly recognized that language that is capable of civil *and* criminal applications must receive the same construction in both contexts, and that the rule of lenity does not change that principle of consistency. See, *e.g.*, *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. at 806; *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 n.10 (1992) (plurality opinion); *id.* at 2110 (Scalia, J., concurring in judgment). By departing from the uniform course of pertinent decisions on the meaning of the "point source" requirement, the decision of the court of appeals in this case, if allowed to stand, will cause substantial confusion concerning an important question under the Act.

4. The decision of the court of appeals poses a serious threat to civil and criminal enforcement of the Clean Water Act. Because the same statutory definitions apply equally to civil and criminal enforcement actions under the Act, the Second Circuit's decision will be relied upon by defendants who will claim that their polluting conduct, despite being specifically identifiable and controllable, is not covered by the Act.

In addition, the Second Circuit's decision leaves seriously unclear the nature of the "industrial" or "municipal" connection that the court believes is necessary to invoke the protections of the Act. Respondent was convicted, after all, of polluting a major waterway with medical wastes that originated in his commercial blood testing laboratory. It is accordingly difficult to see in what sense his conduct can be deemed unconnected to the commercial production of goods and services that is the hallmark of "industry." Yet the court of appeals concluded that the intervention of a human hand between his "conveyance" and the water constitutes a complete defense to prosecution, warranting outright dismissal of the indictment. That unwarranted emphasis on the intervention of a human hand, which arguably could even be applied to the hand that operates a dumptruck, is an open invitation to circumvention of the comprehensive statutory scheme that Congress adopted.

Requiring civil and criminal enforcement under the Act to depend on whether a human hand intervened between a conveyance and the water would frustrate the fundamental statutory purpose of prohibiting pollution of the Nation's waterways. Even the court of appeals recognized (App., *infra*, 17a) that respondent's polluting activities were dangerous and reprehensible.[5] But the court excused respondent's con-

[5] Indeed, in the particular factual context of pollution caused by medical wastes, Congress amended the Act, after the events at issue in this case, to prohibit all "discharges" of medical wastes into navigable waters. See 33 U.S.C. 1311(f) (effective November 19, 1988, see United States Public Vessel Medical Waste Anti-Dumping Act of 1988, Pub. L. No. 100-688, Tit. III, § 3202(b), 102 Stat. 4154). The question presented in this case, under the Clean Water Act, is of course of broader

duct in a manner that invites other would-be polluters to attempt to drive the army of laborers hypothesized by Judge Oakes through the eye of the Second Circuit's needle. Review by this Court is, accordingly, warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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applicability because it affects discharges of many kinds of pollutants, not just medical wastes.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 61, 79, Dockets 92-1090, 92-1091

UNITED STATES OF AMERICA, APPELLEE-
CROSS-APPELLANT

v.

PLAZA HEALTH LABORATORIES, INC., DEFENDANT

GERONIMO VILLEGAS, DEFENDANT-
APPELLANT-CROSS-APPELLEE

Argued Sept. 16, 1992
Decided Sept. 1, 1993

Before: OAKES, KEARSE, and PRATT, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

Defendant Geronimo Villegas appeals from a judgment entered in the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge*, convicting him of two counts of knowingly discharging pollutants into the Hudson River in violation of the Clean Water Act ("CWA"). *See* 33 U.S.C. §§ 1311 and 1319(c)(2). The government cross-appeals, claiming the district court erred in its post-verdict grant of a judgment of acquittal on two counts of violating the knowing-endangerment provisions of the act. *See* 33 U.S.C. § 1319(c)(3).

FACTS AND BACKGROUND

Villegas was co-owner and vice president of Plaza Health Laboratories, Inc., a blood-testing laboratory in Brooklyn, New York. On at least two occasions between April and September 1988, Villegas loaded containers of numerous vials of human blood generated from his business into his personal car, and drove to his residence at the Admirals Walk Condominium in Edgewater, New Jersey. Once at his condominium complex, Villegas removed the containers from his car and carried them to the edge of the Hudson River. On one occasion he carried two containers of the vials to the bulkhead that separates his condominium complex from the river, and placed them at low tide within a crevice in the bulkhead that was below the high-water line.

On May 26, 1988, a group of eighth graders on a field trip at the Alice Austin House in Staten Island, New York, discovered numerous glass vials containing human blood along the shore. Some of the vials had washed up on the shore; many were still in the water. Some were cracked, although most remained sealed with stoppers in solid-plastic containers or ziplock bags. Fortunately, no one was injured. That afternoon, New York City workers recovered approximately 70 vials from the area.

On September 25, 1988, a maintenance worker employed by the Admirals Walk Condominium discovered a plastic container holding blood vials wedged between rocks in the bulkhead. New Jersey authorities retrieved numerous blood vials from the bulkhead later that day.

Ten of the retrieved vials contained blood infected with the hepatitis-B virus. All of the vials recovered were eventually traced to Plaza Health Laboratories.

Based upon the May 1988 discovery of vials, Plaza Health Laboratories and Villegas were indicted on May 16, 1989, on two counts each of violating §§ 1319(c)(2) and (3) of the Clean Water Act. 33 U.S.C. § 1251 *et seq.* A superseding indictment charged both defendants with two additional CWA counts based upon the vials found in September 1988.

In December of 1990 the district court granted the government's motion to sever all claims against Plaza Health Laboratories, apparently due to Plaza's participation in ongoing bankruptcy proceedings. The government then proceeded to trial against Villegas only.

Counts II and IV of the superseding indictment charged Villegas with knowingly discharging pollutants from a "point source" without a permit. *See* 33 U.S.C. §§ 1311(a), 1319(c)(2). Counts I and III alleged that Villegas had discharged pollutants, knowing that he placed others in "imminent danger of death or serious bodily injury". *See* 33 U.S.C. § 1319(c)(3). On January 31, 1991, following a trial before Judge Korman, the jury found Villegas guilty on all four counts.

Renewing a motion made at trial, Villegas moved for a judgment of acquittal on all counts under rule 29 of the Federal Rules of Criminal Procedure. Judge Korman granted the motion on counts I and III, holding that he had incorrectly instructed the jury on the act's "knowing endangerment" provisions. This ruling is reported at 784 F.Supp. 6, 13-14 (E.D.N.Y. 1991). The district judge denied the motion on counts II and IV, rejecting arguments that the act did not envision a human being as a "point source". 784 F. Supp. at 10-11.

Judge Korman sentenced Villegas on counts II and IV to two concurrent terms of twelve months' im-

prisonment, one year of supervised release, and a $100 special assessment. Execution of the sentence was stayed pending this appeal.

Villegas contends that one element of the CWA crime, knowingly discharging pollutants from a "point source", was not established in his case. He argues that the definition of "point source", 33 U.S.C. § 1362(14), does not include discharges that result from the individual acts of human beings. Raising primarily questions of legislative intent and statutory construction, Villegas argues that at best, the term "point source" is ambiguous as applied to him, and that the rule of lenity should result in reversal of his convictions. The government has cross-appealed from the district court's post-verdict order acquitting Villegas on the two knowing-endangerment counts.

DISCUSSION

Because "discharge from a point source" is an essential element of a "knowing" violation as well as a "knowing endangerment" violation, *see* 33 U.S.C. §§ 1319(c)(2)-(3) and discussion *infra*, we need not address the government's contentions regarding the CWA's definition of "imminent danger" if we should conclude that Villegas's discharges were not "from a point source". We therefore consider the "point source" issue first.

A. Navigating the Clean Water Act.

The basic prohibition on discharge of pollutants is in 33 U.S.C. § 1311(a), which states:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, *1342*, and 1344 of this title, the *discharge* of any *pollutant* by any person shall be unlawful.

Id. (emphasis added).

The largest exception to this seemingly absolute rule is found in 33 U.S.C. § 1342, which establishes the CWA's national pollutant discharge elimination system, or NPDES:

> (a) Permits for discharge of pollutants
>
> (1) Except as provided in sections 1328 [aquaculture] and 1344 of this title [dredge and fill permits], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant * * * *notwithstanding section 1311(a) of this title*, upon condition that such discharge will meet * * * all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title * * *.

33 U.S.C. § 1342(a) (emphasis added).

Reading § 1311(a), the basic prohibition, and § 1342(a)(1), the permit section, together, we can identify the basic rule, our rhumb line to clean waters, that, absent a permit, "the discharge of any pollutant by any person" is unlawful. 33 U.S.C. § 1311(a).

We must then adjust our rhumb line by reference to two key definitions—"pollutant" and "discharge". "Pollutant" is defined, in part, as "biological materials * * * *discharged* into water." 33 U.S.C. § 1362(6) (emphasis added). "Discharge", in turn, is "any addition of any pollutant to navigable waters *from any point source* * * *." (emphasis added). 33 U.S.C. § 1362(12).

As applied to the facts of this case, then, the defendant "added" a "pollutant" (human blood in glass vials) to "navigable waters" (the Hudson River), and he did so without a permit. The issue, therefore, is whether his conduct constituted a "discharge", and that in turn depends on whether the addition of the

blood to the Hudson River waters was "from any point source".

For this final course adjustment in our navigation, we look again to the statute.

> (14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

During and after Villegas's trial, Judge Korman labored over how to define "point source" in this case. At one point he observed that the image of a human being is not "conjured up" by congress's definition of "point source". Ultimately, he never defined the "point source" element but he did charge the jury:

> Removing pollutants from a container, and a vehicle is a container, parked next to a navigable body of water and physically throwing the pollutant into the water constitutes a discharge from a point source.

In ruling on Villegas's rule 29 motion, however, Judge Korman held that the element "point source" may reasonably be read

> to include any discrete and identifiable conduit—*including a human being*—designated to collect or discharge pollutants produced in the course of a waste-generating activity. (emphasis added).

As the parties have presented the issue to us in their briefs and at oral argument, the question is "whether a human being can be a point source". Both sides focus on the district court's conclusion in its rule 29 memorandum that, among other things, the requisite "point source" here could be Villegas himself.

Significantly, the jury was never clearly instructed on this legal theory, and the instruction actually given bordered on an improper removal of the determination of an essential element of the crime from the jury's consideration. Serious problems might be presented by the government's attempt to justify Judge Korman's post-verdict definitional efforts as an alternate theory upon which to uphold Villegas's convictions. *Chiarella v. United States*, 445 U.S. 222, 236, 100 S.Ct. 1108, 1118, 63 L.Ed.2d 348 (1980) (court may not affirm criminal conviction on basis of theory not presented to jury).

However, far more fundamental than any error in jury instructions is the problem highlighted by the district court's analytical struggle to find somewhere in the Villegas transaction a "discernible, confined and discrete conveyance". Simply put, that problem is that this statute was never designed to address the random, individual polluter like Villegas.

To determine the scope of the CWA's "point source" definition, we first consider the language and structure of the act itself. If the language is not plain, an excursion into legislative history and context may prove fruitful. Judicial interpretations of the term can be instructive as well, as may be interpretive statements by the agency in charge of implementing the statute. If we conclude after this analysis that the statute is ambiguous as applied to Villegas, then the rule of lenity may apply. *Moskal v.*

United States, 498 U.S. 103, 107, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990); *United States v. Concepcion*, 983 F.2d 369, 380 (2d Cir.1992).

1. *Language and Structure of Act.*

Human beings are not among the enumerated items that may be a "point source". Although by its terms the definition of "point source" is nonexclusive, the words used to define the term and the examples given ("pipe, ditch, channel, tunnel, conduit, well, discrete fissure", etc.) evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways.

In addition, if every discharge involving humans were to be considered a "discharge from a point source", the statute's lengthy definition of "point source" would have been unnecessary. It is elemental that congress does not add unnecessary words to statutes. Had congress intended to punish any human being who polluted navigational waters, it could readily have said: "any person who places pollutants in navigable waters without a permit is guilty of a crime."

The Clean Water Act generally targets industrial and municipal sources of pollutants, as is evident from a perusal of its many sections. Consistent with this focus, the term "point source" is used throughout the statute, but invariably in sentences referencing industrial or municipal discharges. *See, e.g.*, 33 U.S.C. § 1311 (referring to "owner or operator" of point source); § 1311(e) (requiring that effluent limitations established under the Act "be applied to all point sources of discharge"); § 1311(g)(2) (allows an "owner or operator of a point source" to apply to EPA for modification of its limitations requirements); § 1342(f) (referring to classes, categories, types, and

sizes of point sources); § 1314(b)(4)(B) (denoting "best conventional pollutant control technology measures and practices" applicable to any point source within particular category or class); § 1316 ("any point source * * * which is constructed as to meet all applicable standards of performance"); § 1318(a) (administrator shall require owner or operator of any point source to install, use and maintain monitoring equipment or methods); and § 1318(c) (states may develop procedures for inspection, monitoring, and entry with respect to point sources located in state).

This emphasis was sensible, as "[i]ndustrial and municipal point sources were the worst and most obvious offenders of surface water quality. They were also the easiest to address because their loadings emerge from a discrete point such as the end of a pipe." David Letson, *Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey*, 32 Nat.Resources J. 219, 221 (1992).

Finally on this point, we assume that congress did not intend the awkward meaning that would result if we were to read "human being" into the definition of "point source". Section 1362(12)(A) defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source". Enhanced by this definition, § 1311(a) reads in effect "the addition of any pollutant to navigable waters *from any point source by any person* shall be unlawful" (emphasis added). But were a human being to be included within the definition of "point source", the prohibition would then read: "the addition of any pollutant to navigable waters *from any person by any person* shall be unlawful", and this simply makes no sense. As the statute stands today, the term "point source" is comprehensible only if it is held to the context of industrial and municipal discharges.

2. *Legislative History and Context.*

The broad remedial purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters". 33 U.S.C. § 1251(a). The narrow questions posed by this case, however, may not be resolved merely by simple reference to this admirable goal. *See National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal"). We agree with the court in *National Wildlife Fed'n* that "even if we accept the purposes section at face value, it is only suggestive, not dispositive of [the issue before us]. Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision." *Id.*

The legislative history of the CWA, while providing little insight into the meaning of "point source", confirms the act's focus on industrial polluters. Congress required NPDES permits of those who discharge from a "point source". The term "point source", introduced to the act in 1972, was intended to function as a means of identifying industrial polluters—generally a difficult task because pollutants quickly disperse throughout the subject waters. The senate report for the 1972 amendments explains:

> In order to further clarify the scope of the regulatory procedures in the Act the Committee had added a definition of point source to distinguish between control requirements where there are *specific confined conveyances, such as pipes*, and control requirements which are imposed to control runoff. The control of pollutants from runoff is applied pursuant to section 209 and the

> authority resides in the State or other local agency.

S.Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3744.

Senator Robert Dole added his comments to the committee report:

> Most of the problems of agricultural pollution deal with non-point sources. Very simply, a non-point source of pollution is one that does not confine its polluting discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit; thus, a feedlot would be considered to be a non-point source as would pesticides and fertilizers.

Id. at 3760 (supplemental views). *See also National Wildlife Fed'n*, 693 F.2d at 175 (congress's focus was on traditional industrial and municipal wastes); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 118-21, 97 S. Ct. 965, 970-71, 51 L.Ed.2d 204 (1977) (outlines EPA scheme of effluent limitations for subject industrial groups).

We find no suggestion either in the act itself or in the history of its passage that congress intended the CWA to impose criminal liability on an individual for the myriad, random acts of human waste disposal, for example, a passerby who flings a candy wrapper into the Hudson River, or a urinating swimmer. Discussions during the passage of the 1972 amendments indicate that congress had bigger fish to fry.

The 1972 congress modeled the NPDES, its aggressive new permitting program, after the Rivers and Harbors Act of 1899 ("RHA"; known also as the Refuse Act), 33 U.S.C. § 401, *et seq.* *See* S.Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672 & 3738. The CWA's focus on transporting pollutants to navigable waters via the "point source" mechanism

represented a departure from the RHA's more general approach:

> It shall not be lawful to throw, discharge, or deposit * * * any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States * * *.

33 U.S.C. § 407.

Unlike §§ 1311 and 1319(c)(2) of the CWA, the RHA's relevant criminal provision, 33 U.S.C. § 411, has been held to provide for strict liability, and the most severe criminal penalty is a misdemeanor. *United States v. White Fuel Corp.*, 498 F.2d 619, 622 (1st Cir. 1974). Accordingly, we view with skepticism the government's contention that we should broadly construe the greatly magnified penal provisions of the CWA based upon RHA cases that did so in the context of strict-liability and misdemeanor penalties. *See, e.g., United States v. Standard Oil Co.*, 384 U.S. 224, 229-30, 86 S.Ct. 1427, 1429-30, 16 L.Ed.2d 492 (1966) (holding "refuse matter" in § 407 includes commercially valuable gasoline accidentally discharged into navigable river); *United States v. American Cyanamid Co.*, 354 F.Supp. 1202, 1205 (S.D.N.Y. 1973) (construing RHA broadly, court held that refuse discharged into tributary satisfied "navigable waters" requirement); *see also United States v. Republic Steel Corp.*, 362 U.S. 482, 489-91, 80 S.Ct. 884, 888-90, 4 L.Ed.2d 903 (1960) (RHA construed broadly in injunction context; RHA "obstruction" included liquid matter discharged from mills which impaired navigation by settling in bottom of channel).

3. *Caselaw.*

Our search for the meaning of "point source" brings us next to judicial constructions of the term.

The "point source" element was clearly established in the few CWA criminal decisions under § 1319(c) that are reported. *See United States v. Boldt*, 929 F.2d 35, 37-38 (1st Cir.1991) (discharge of partially untreated industrial wastewater from storage tank directly into municipal sewer); *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1125 (3d Cir.1979) (compost materials discharged from pipe into tributary of creek), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980); *United States v. Hamel*, 551 F.2d 107, 108 (6th Cir.1977) (gasoline pumped into lake from underground tank); *cf. United States v. Oxford Royal Mushroom Products, Inc.*, 487 F.Supp. 852, 854 (E.D. Pa. 1980) (overflow of spray-irrigation system discharging waste water into nearby stream is "point source" discharge).

With the exception of *Oxford Royal Mushroom, supra*, the cases that have interpreted "point source" have done so in civil-penalty or licensing settings, where greater flexibility of interpretation to further remedial legislative purposes is permitted, and the rule of lenity does not protect a defendant against statutory ambiguities. *See, e.g., Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir.1983) ("point source" includes bulldozing equipment that discharged dredged materials onto wetland).

For example, our circuit recently held in *Dague v. City of Burlington*, a civil-penalty case, that a discharge of pollutant-laden leachate into a culvert leading to navigable waters was through a "point source". 935 F.2d 1343, 1354-55 (2d Cir.1991), *rev'd in*

part on other grounds, --- U.S. ----, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). But in *Dague*, unlike in this case, the city's discharge involved a culvert, one of the specifically enumerated examples of a "point source" set forth in § 1362(14). *Dague*, 935 F.2d at 1354. *Dague* thus presented a classic "point source" discharge.

The government relies on broad dicta in another civil case, *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir.1979), in which the court held "[t]he concept of a point source was designed to further this [permit regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." We do not find this *Earth Sciences* dicta persuasive here, however, because that court found a "point source" in a ditch used in the mining operation—certainly not a far leap when "ditch" also is an expressly listed example of a "point source". We cannot, however, make the further leap of writing "human being" into the statutory language without doing violence to the language and structure of the CWA.

4. *Regulatory Structure.*

Finally, not even the EPA's regulations support the government's broad assertion that a human being may be a "point source". *Cf. National Wildlife Fed'n*, 693 F.2d at 166-67 & 173 n. 54 (as EPA has power to define point and nonpoint sources in CWA, courts must give great deference to EPA's construction of "point source"). The EPA stresses that the discharge be "through pipes, sewers, or other conveyances":

Discharge of a pollutant means:

> (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source".
>
> * * * * * *
>
> This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; *discharges through pipes, sewers, or other conveyances* owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

40 C.F.R. § 122.2 (1992) (emphasis supplied).

In sum, although congress had the ability to so provide, § 1362(14) of the CWA does not expressly recognize a human being as a "point source"; nor does the act make structural sense when one incorporates a human being into that definition. The legislative history of the act adds no light to the muddy depths of this issue, and cases urging a broad interpretation of the definition in the civil-penalty context do not persuade us to do so here, where congress has imposed heavy criminal sanctions. Adopting the government's suggested flexibility for the definition would effectively read the "point source" element of the crime out of the statute, and not even the EPA has extended the term "point source" as far as is urged here.

We accordingly conclude that the term "point source" as applied to a human being is at best ambiguous.

B. *Rule of Lenity.*

In criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant's favor. *Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 1006, 108 L.Ed. 2d 132 (1990) (ambiguity in criminal statute resolved in defendant's favor "unless and until Congress plainly states that we have misconstrued its intent"); *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980) (same); *Huddleston v. United States*, 415 U.S. 814, 830-31, 94 S.Ct. 1262, 1271-72, 39 L.Ed.2d 782 (1974) (ambiguity concerning ambit of criminal statutes should be resolved in favor of lenity). In other words, we cannot add to the statute what congress did not provide. "[B]efore a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485, 37 S.Ct. 407, 411, 61 L.Ed. 857 (1917).

Since the government's reading of the statute in this case founders on our inability to discern the "obvious intention of the legislature", *Huddleston*, 415 U.S. at 831, 94 S.Ct. at 1272, to include a human being as a "point source", we conclude that the criminal provisions of the CWA did not clearly proscribe Villegas's conduct and did not accord him fair warning of the sanctions the law placed on that conduct. Under the rule of lenity, therefore, the prosecutions against him must be dismissed.

C. *Knowing Endangerment.*

As noted above, our ruling on "point source" obviates the need for us to address the government's cross-appeal that the district court erred in acquitting Villegas of two counts of "knowing endanger-

ment" when it adopted post-trial a different definition of "imminent danger" than what it had included in its charge to the jury. We affirm the district court's acquittal on these two counts on the same ground upon which we reverse the other two counts: defendant's discharges were not from a "point source" as defined in the act.

CONCLUSION

The Clean Water Act targets industrial and municipal production of pollutants. Its criminal provisions do not reach actions such as those done by Villegas, despite their heinous character. While we might think it desirable to punish such an obviously wrong act, we must nevertheless ensure that we apply the statute as congress wrote it, giving Villegas the benefit of the substantial ambiguity in its meaning. Justice Douglas's comments, made in reviewing a 1966 prosecution under the Rivers and Harbors Act, are equally appropriate today:

> This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions.

Standard Oil Co., 384 U.S. at 225, 86 S.Ct. at 1428.

Compelled by the rule of lenity, we reverse Villegas's judgment of conviction and remand with a direction to dismiss the indictment.

Convictions reversed; cross-appeal affirmed.

OAKES, Circuit Judge, dissenting:

I agree that this is not the typical Clean Water Act prosecution—though, as criminal prosecutions under the Act are infrequent, or at least result in few published judicial opinions, what is "typical" is as yet ill-defined. I also agree that the prosecutors in this case may not have defined the theory of their case before proceeding to trial as well as they might have, thereby complicating the task of determining whether the jury was asked to resolve the proper factual questions. However, because I do not agree that a person can never be a point source, and because I believe that Mr. Villegas' actions, as the jury found them, fell well within the bounds of activity proscribed by the Clean Water Act's bar on discharge of pollutants into navigable waters, I am required to dissent.

Point source.

I begin with the proposition that the Clean Water Act bars "the discharge of any pollutant by any person," except as authorized elsewhere in the Act. 33 U.S.C. § 1311(a) (1988). The only limiting factors are definitional: the Act bars "discharges" from "point sources" of "pollutants" to "navigable waters."[1] It does not bar nonpoint source pollution, pollution of dry land or nonnavigable waters, or the movement of existing pollution within the navigable waters.

The key in this case is the definition of a point source. The term is introduced as part of the definition of "discharge of a pollutant": "any addition of any pollutant to navigable waters from any point

[1] This list is not exclusive. The terms listed are defined at 33 U.S.C. § 1362(12), (14), (6) and (7) (1988), respectively.

source." 33 U.S.C. § 1362(12)(A) (1988). The term "point source," in turn, is defined as

> *any discernible, confined and discrete conveyance, including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (1988) (emphasis added).

The language of this definition indicates that it encompasses a wide range of means of placing pollutants into navigable waters. The question before us is what, in addition to the listed examples, is a "discernible, confined and discrete conveyance."

I begin with the obvious, in hopes that it will illuminate the less obvious: the classic point source is something like a pipe. This is, at least in part, because pipes and similar conduits are needed to carry large quantities of waste water, which represents a large proportion of the point source pollution problem. Thus, devices designed to convey large quantities of waste water from a factory or municipal sewage treatment facility are readily classified as point sources. Because not all pollutants are liquids, however, the statute and the cases make clear that means of conveying solid wastes to be dumped in navigable waters are also point sources. *See, e.g.*, 33 U.S.C. § 1362(14) ("rolling stock," or railroad cars, listed as an example of a point source); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir.1983) (backhoes and bulldozers used to gather fill and deposit it on wetlands are point sources).

What I take from this look at classic point sources is that, at the least, an organized means of channeling and conveying industrial waste in quantity to navigable waters is a "discernible, confined and discrete conveyance." The case law is in accord: courts have deemed a broad range of means of depositing pollutants in the country's navigable waters to be point sources. *See, e.g., Rybachek v. EPA*, 904 F.2d 1276 (9th Cir.1990) (placer mining; sluice box from which discharge water is redeposited in stream is point source, despite provisions protecting some mining activities); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505-06 (11th Cir.1985) (tugs redepositing dirt from bottom of water body onto beds of water grass are point sources discharging the dirt), *vacated on other grounds*, 481 U.S. 1034, 107 S.Ct. 1968, 95 L.Ed.2d 809 (1987) (defendants' right to jury trial); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir.1980) (spill of contaminated runoff from strip mine, if collected or channeled by the operator, is point source discharge); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir.1979) (same); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1372 (4th Cir.1976) (same); *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642, 655 (E.D.Pa.1981) (same). Nor have courts been inclined to exclude mining or agricultural point sources, despite the fact that portions of the Clean Water Act protect these industries to some extent. *See Rybachek*, 904 F.2d 1276; *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 251 (4th Cir.1979) (EPA has no discretion to exempt mining point sources from regulation), *rev'd in part on other grounds sub nom. National Crushed Stone Ass'n*, 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980); *United States v. Frezzo Bros., Inc.*, 546 F.Supp. 713, 718 (E.D.Pa.1982) (mushroom composting is not agri-

culture, so exception for agricultural point sources not applicable to pipe carrying stormwater runoff), *aff'd*, 703 F.2d 62 (3d Cir.) (per curiam), *cert. denied*, 464 U.S. 829, 104 S.Ct. 106, 78 L.Ed.2d 109 (1983).

Further, the legislative history indicates that the Act was meant to control periodic, as well as continuous, discharges. S.Rep. No. 92-414, 92d Cong. 1st Sess. (1971), reprinted at 1972 U.S.C.C.A.N. 3668, 3705.

In short, the term "point source" has been broadly construed to apply to a wide range of polluting techniques, so long as the pollutants involved are not just humanmade, but reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort. From these cases, the writers of one respected treatise have concluded that such a "man-induced gathering mechanism plainly is the essential characteristic of a point source" and that a point source, "[p]ut simply, ... is an identifiable conveyance of pollutants." 5 Robert E. Beck, *Waters & Water Rights* § 53.01(b)(3) at 216-17 (1991), *citing Sierra Club v. Abston Constr. Co.*, 620 F.2d at 45 (miners channeled waters into sump pits which leaked after heavy rains); *Earth Sciences*, 599 F.2d at 373; and *Avoyelles Sportsmen's League*, 473 F.Supp. 525. *See also Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir.1991) (term "point source" should be defined broadly to include culvert conveying landfill leachate, though the culvert itself did not "add" pollutants to the navigable waters, but conveyed them from one navigable body of water, into which the pollutants had leaked, to another), *rev'd in part on other grounds*, --- U.S. ----, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir.1979) (noting that Congress defined "point

source" broadly so that it would be applicable to thousands of contemplated point sources, not all of which could possibly be enumerated); *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1373 (EPA may regulate channeled runoff, but not unchanneled runoff). In explaining why a broad definition was needed, the *Kennecott Copper* court, quoting *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1032 (10th Cir.1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1340, 51 L.Ed.2d 601 (1977), noted that the statute sets as its goal the "attainment of the no discharge objective," and that this objective could not be achieved if the term "point source" were read narrowly. 612 F.2d at 1243.

This broad reading of the term "point source" is essential to fulfill the mandate of the Clean Water Act, in that

> [t]he touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.
>
> . . . . .
>
> We believe it contravenes the intent of FWPCA and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point.

Earth Sciences, 599 F.2d 368, 373.

Nonetheless, the term "point source" sets significant definitional limits on the reach of the Clean Water Act. Fifty percent or more of all water pollution is thought to come from nonpoint sources. S.Rep. 99-50, 99th Cong., 1st Sess. 8 (1985); William F. Pedersen, Jr., *Turning the Tide on Water Quality*, 15 Ecol.L.Q. 69, n. 10 (1988). So, to further refine the definition of "point source," I consider what it is that the Act does not cover: nonpoint source discharges.[2]

Nonpoint source pollution is, generally, runoff: salt from roads, agricultural chemicals from farmlands, oil from parking lots, and other substances washed by rain, in diffuse patterns, over the land and

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[2] The cases and commentators all seem to assume that all water pollution is either point source pollution or nonpoint source pollution. *See, e.g., Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 849 (9th Cir.1987); *Friends of the Sakonnet v. Dutra*, 738 F.Supp. 623, 630 and n. 11 (D.R.I.1990); Zygmunt J.B. Plater, et al., *Environmental Law and Policy: Nature, Law and Society* 830 (1992); Frederick R. Anderson, Daniel R. Mandelker, and A. Dan Tarlock, *Environmental Protection: Law and Policy* 377 (2d ed. 1990); 2 William H. Rodgers, Jr., *Environmental Law: Air and Water* § 4.9 at 125-26 and § 4.10 at 146 (but noting that distinguishing point sources from nonpoint sources can be difficult, and listing as an example of a difficult question "the fellow in the truck at the edge of the stream," *id.* at 126) (1986); Frank P. Grad, *Treatise on Environmental Law* 3.03[4][n] 3-215 n. 366.6 (7/92) (looseleaf); Esther Bartfeld, *Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 Envtl.Law 43, 45, 45 n. 6, 47 (1993); John H. Davidson, *Commentary: Using Special Water Districts to Control Nonpoint Source of Water Pollution*, 22 Land Use & Envtl.L.Rev. 515, 516 (1991); Robert D. Fentress, *Comment: Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 Envtl.L. 807, 811 n. 16 (1989); Richard J. Lazarus, *Comment: Nonpoint Source Pollution*, 2 Harv.Envtl.L.Rev. 176, 176-77, 177 n. 2 (1977).

into navigable waters.[3] The sources are many, difficult to identify and difficult to control. Indeed, an effort to greatly reduce nonpoint source pollution could require radical changes in land use patterns which Congress evidently was unwilling to mandate without further study.[4] The structure of the statute—which regulates point source pollution closely, while leaving nonpoint source regulation to the states under the Section 208 program—indicates that the term "point source" was included in the

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[3] According to the EPA, nonpoint source pollution

> is caused by diffuse sources that are not regulated as point sources and normally is associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. Such pollution results in the human-made or human-induced alteration of the chemical, physical, biological, and radiological integrity of water. In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

EPA Office Of Water, Office of Water Regulations and Standards, *Nonpoint Source Guidance* 3 (1987).

[4] As Professors Anderson, Mandelker, and Tarlock have observed,

> Congress expressed great faith in the ability of engineers to limit what came out of pipes but less faith in the ability of engineers to fix non-point source pollution:
>
> > There is no effective way as yet, other than land use control, by which you can intercept that runoff and control it in the way that you do a point source. We have not yet developed technology to deal with that kind of a problem. ... [Senate Debate on S. 2770, Nov. 2, 1971, reported in 1972 Legislative History, at 1315.]

Frederick R. Anderson, Daniel R. Mandelker, and A. Dan Tarlock, *Environmental Protection: Law and Policy* 377 (2d ed. 1990).

definition of discharge so as to ensure that nonpoint source pollution would not be covered. Instead, Congress chose to regulate first that which could easily be regulated: direct discharges by identifiable parties, or point sources.

This rationale for regulating point and nonpoint sources differently—that point sources may readily be controlled and are easily attributable to a particular source, while nonpoint sources are more difficult to control without radical change, and less easily attributable, once they reach water, to any particular responsible party—helps define what fits within each category. Thus, Professor Rodgers has suggested, "[t]he statutory 'discernible, confined and discrete conveyance' ... can be understood as singling out those candidates suitable for control-at-the-source." 2 William H. Rodgers, Jr., *Environmental Law: Air and Water* § 4.10 at 150 (1986). And, as Professor Rodgers notes, "[c]ase law confirms the controllability theory, adding to it a responsibility component, so that 'point sources' are understood both as sources that can be cleaned up and as sources where fairness suggests the named parties should do the cleaning." *Id. And see, e.g., National Resources Defense Council, Inc. v. EPA*, 915 F.2d 1314, 1316 (9th Cir.1990) ("The Act focused on point source polluters presumably because they could be identified and regulated more easily than nonpoint source polluters."); *Earth Sciences*, 599 F.2d at 371 ("[b]ecause nonpoint sources of pollution ... are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them"); National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 64 (1973).

While Villegas' activities were not prototypical point source discharges—in part because he was disposing of waste that could have been disposed of on land, and so did not need a permit or a pipe—they much more closely resembled a point source discharge than a nonpoint source discharge. First, Villegas and his lab were perfectly capable of avoiding discharging their waste into water: they were, in Professor Rodgers' terms, a "controllable" source.

Furthermore, the discharge was directly into water, and came from an identifiable point, Villegas. Villegas did not dispose of the materials on land, where they could be washed into water as nonpoint source pollution. Rather, he carried them, from his firm's laboratory, in his car, to his apartment complex, where he placed them in a bulkhead below the high tide line. I do not think it is necessary to determine whether it was Mr. Villegas himself who was the point source, or whether it was his car, the vials, or the bulkhead: in a sense, the entire stream of Mr. Villegas' activity functioned as a "discrete conveyance" or point source. The point is that the source of the pollution was clear, and would have been easy to control. Indeed, Villegas was well aware that there were methods of controlling the discharge (and that the materials were too dangerous for casual disposal): his laboratory had hired a professional medical waste handler. He simply chose not to use an appropriate waste disposal mechanism.

Villegas' method may have been an unusual one for a corporate officer, but it would undermine the statute—which, after all, sets as its goal the elimination of discharges, 33 U.S.C. § 1311(a)—to regard as "ambiguous" a Congressional failure to list an

unusual method of disposing of waste.[5] I doubt that Congress would have regarded an army of men and women throwing industrial waste from trucks into a stream as exempt from the statute. Since the Act contains no exemption for de minimus [*sic*] violations—since, indeed, many Clean Water Act prosecutions are for a series of small discharges, each of which is treated as a single violation—I cannot see that one man throwing one day's worth of medical waste into the ocean differs (and indeed, with this type of pollution, it might be that only a few days' violations could be proven even if the laboratory regularly relied on Villegas to dispose of its waste by throwing it into the ocean). A different reading would encourage corporations perfectly capable of abiding by the Clean Water Act's requirements to ask their employees to stand between the company trucks and the sea, thereby transforming point source pollution (dumping from trucks) into nonpoint source pollution

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[5] I recognize the dangers of "pa[ying] too much attention to the broad stated purposes of the [Clean Water] Act." *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 171 (D.C.Cir.1982) (reversing district court ruling that EPA decision not to regulate dams as point sources was improper in light of these broad goals, and holding that the EPA could reasonably conclude that dams were not covered, at least where they do not "add" ordinary "pollutants," but either move already polluted water from one side of the dam to the other or change water "conditions" such as heat, dissolved oxygen content, and saturation levels).

However, there are also dangers to paying too little attention to such broad stated goals. While the Clean Water Act may not always live up to its grand ambitions, in particular by setting definitional limits on what it covers (only pollution, only point sources), its ambitious goals are nonetheless useful interpretive guides: they indicate that, all other things being equal, a generous rather than a cramped interpretation of the statute is more likely to be what Congress intended.

(dumping by hand). Such a method is controllable, easily identifiable, and inexcusable. To call it non-point source pollution is to read a technical exception into a statute which attempts to define in broad terms an activity which may be conducted in many different ways.

Having explained my own view of what a "point source" is, and why Villegas, or his activities in carrying waste from his lab to the ocean, was a point source, I will attempt to confront the majority's counterarguments. My colleagues suggest that a person can never be a point source, relying heavily on the supposed redundancy produced when the Act's language barring the "discharge of any pollutant by any person" is read with the definitional terms placed in terms of the linguistic variables, as follows: "any addition of any pollutant to navigable waters from a person by a person." Granted, this sounds odd. But I believe the oddity is an artifact of assuming that the term "person" means the same thing in both parts of the sentence, and that in both cases it means what it means in everyday language.

The apparent oddness disappears when one grasps that the first term "person" in the peculiar sentence means "a person acting as a point source"[6] and that the second term "person" has been defined, typically for statutes imposing responsibility on a variety of parties, but not typically for ordinary speech, as a

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[6] In my view, persons can be both point and nonpoint sources of pollution. They may be point sources when they deposit waste directly into water; they may be nonpoint sources when they, for example, spread fertilizer on the ground or deposit oil in a driveway, leaving it to be washed into nearby rivers. Thus, to say that the Clean Water Act bars persons polluting, rather than point sources polluting, would be too broad.

responsible party. As the linguistic hint "any" before both "person" and "point source" suggests, the terms are to be construed broadly. Thus, for example, one could fill in the linguistic variables as follows: the Act bars the addition of any pollutant to navigable waters by an employee's throwing them there (a person acting as a point source) at the instruction of his or her employer (a corporation, or person capable of being held responsible) and in particular of his or her supervisor (also a person capable of being held responsible). More specifically, the sentence could refer to an individual hired to convey, by hand, all of a corporation's toxic wastes from the company's back door to the Mississippi River, three feet away (the point source), by that individual and by the corporation which authorized the disposal (the potential defendants). I do not think technical arguments about whether the toxic substances were in discrete containers are fruitful when the activity is discrete, conveys pollutants, and is confined to a clear, traceable single source. When a company chooses to use the nation's waters as a dumpsite for waste it has created and gathered in a manageable place,[7] it should ask for a permit or face prosecution.

I am of course given pause, however, by the nature of the criminal sanctions attached to point source discharges under § 1319. Given the broad statutory definitions of pollutant and point source, it would appear that a knowing violation would include intentionally throwing a candy wrapper into the ocean—and that this is an activity which could subject the thrower to a $25,000 fine and three years in jail. It seems improbable to me that this could have been

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[7] I mean to distinguish a company whose agricultural or other activity leaves pollutants dispersed on the land, which may then find their way into the nation's waters.

Congress' intent. Consequently, I would with the majority read the statute as ambiguous as it pertains to individual litterers, as opposed to disposers of industrial and municipal waste.[8] The latter were the principal targets of the authors of the CWA, and, as professional creators of waste, charged with knowledge that disposal of waste into navigable waters is a crime. *Cf. United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943) (Federal Food, Drug and Cosmetic Act requires corporate officers standing in a responsible relationship to the public interest to ensure that products are safe, subject to criminal liability).

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[8] An alternative—that the Act applies only to major discharges—seems to me both administratively unworkable (where does one draw the line?) and inconsistent with the statute and case law. The statutory definition of "discharge" refers to "any" addition of "any" pollutant from "any" point source, indicating a congressional intent to bar all, even minor, violations. Further, the D.C.Circuit has held that EPA has no discretion to limit regulation of point sources to those it deems most significant. *National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C.Cir.1977). This, too, indicates that small as well as large point sources are governed by the Act. Finally, I would note that within the statute's definitional limits, it takes on an absolutist tone. The statute's stated goals, "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a) (1988), suggest that eliminating, not reducing, pollution is the aim. Thus, while the Act exempts certain types of pollution—nonpoint source and agricultural return flows—for policy reasons seen as trumping, at least temporarily, the goal of zero pollution, it takes a categorical approach to point source pollution. As the *Costle* case suggests, neither agencies nor courts should rewrite the statute to be more "reasonable"—less protective of our nation's waters and more indulgent of polluters—than Congress intended.

Furthermore, no factual dispute essential to finding Villegas' activities to have been a point source discharge remains. The jury concluded that Villegas did in fact place pollutants—the materials he brought from the laboratory—into navigable waters; the only question for us is whether this activity is point source pollution. *Cf. United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) (misdefinition of point source in criminal case harmless, where action, if it occurred at all, was point source discharge), *cert. denied*, --- U.S. ----, 113 S.Ct. 1844, 123 L.Ed.2d 468 (1993). Thus, I do not believe that the difficulty the prosecutors had here in defining Villegas' offense resulted in their failing to prove that Villegas violated the law.

Rule of Lenity.

My colleagues also suggest that the statute is sufficiently ambiguous that the rule of lenity requires resolving the ambiguity in Villegas' favor. However, as I have indicated, I do not think the Clean Water Act is ambiguous with respect to an individual physically disposing of medical wastes, in quantity, directly into navigable waters, by means of a controllable, discrete conveyance and course of action. As the Supreme Court has noted,

> [b]ecause the meaning of language is inherently contextual, we have declined to deem a statute 'ambiguous' for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the Government. Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. If that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts....

> Instead we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to "the language and structure, legislative history, and motivating policies" of the statute.

Moskal v. United States, 498 U.S. 103, 108, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990), *quoting Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980) (citations omitted). *See also United States v. Concepcion*, 983 F.2d 369, 379 (1993) (rule of lenity applies only if statute is ambiguous, "giving [the words of the statute] their fair meaning in accordance with the intentions manifested by Congress,") (citing *Bifulco*, 447 U.S. at 387, 100 S.Ct. at 2252) rather than " 'at the beginning as an overriding consideration of being lenient to wrongdoers' " (quoting *United States v. Turkette*, 452 U.S. 576, 587 n. 10, 101 S.Ct. 2524, 2531 n. 10, 69 L.Ed.2d 246 in turn quoting *Callanan v. United States*, 364 U.S. 587, 596, 81 S.Ct. 321, 326, 5 L.Ed.2d 312 (1961)).

Having resorted to the language and structure, legislative history and motivating policies of the Clean Water Act, I think it plain enough that Congress intended the statute to bar corporate officers from disposing of corporate waste into navigable waters by hand as well as by pipe. Further, I would note that this is not the sort of activity that Villegas could honestly have believed violated no statute, whether promulgated by federal, state, or local authorities. Thus, this is not a case in which the defendant had no fair warning that his actions were illegal. No compliance attorney here could have struggled with the difficulty of deciding whether this was activity for which a permit should be sought, as might be the case in a factory dealing with runoff that arguably was channeled and thereby transformed

from nonpoint to point source pollution; rather, an attorney asked to advise Villegas whether his activity was permissible might say that there was as yet no case law indicating that such activity was point source pollution under the Clean Water Act, but that such a view was certainly consistent with the Act and that the behavior would almost certainly be proscribed by that Act or some other.

Knowing Endangerment.

I concur in the majority's ruling on the knowing endangerment counts, though for a different reason. I think the trial court was correct in concluding that the government failed, as a matter of law, to establish "imminent danger," since its own experts agreed that the risk that someone would be harmed by the hepatitis-infected blood in some of the vials, while serious, was quite low.

CONCLUSION

Accordingly, I would affirm the rulings of the district court.

APPENDIX B

UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF NEW YORK

No. 89 CR 338

UNITED STATES OF AMERICA, PLAINTIFF

v.

GERONIMO VILLEGAS, DEFENDANT

Dec. 13, 1991

MEMORANDUM AND ORDER

KORMAN, District Judge.

On May 26, 1988, a teacher at the Saint John's Lutheran School took her eighth grade class on a field trip to the Alice Austin House, a museum on Staten Island that overlooks Pebble Beach on the Hudson River. While playing on the beach after touring the museum, the students came upon numerous glass vials containing what appeared to be human blood lying in the sand. The New York City Sanitation Department later collected approximately seventy of these vials scattered along the shoreline and floating in the incoming tide. The broken remains of others were found among clusters of rocks in the shallow water. Tests later revealed that five of the vials contained blood infected with hepatitis B, an

infectious virus that causes inflammation of the liver and can lead to chronic illness, including cancer, or to death.

Four months later, a maintenance employee at the Admirals Walk Condominium Association (Admirals Walk), an apartment complex bordering the Hudson River in Edgewater, New Jersey, noticed a plastic bag full of blood vials wedged into the rocks of the river bulkhead. Edgewater Police Officers eventually collected at least one hundred vials floating loosely in the river or packed in containers wedged into the bulkhead. Fifty-five of these vials were tested for disease and at least five were found to be infected with hepatitis B.

State investigators traced the vials by the identifying information on their labels to Plaza Health Laboratories, a facility that tests blood for disease and other medical conditions in Brooklyn, New York. The defendant, Geronimo Villegas, was co-owner of Plaza and lived at the Admirals Walk complex when the vials were found. When questioned by state investigators, Mr. Villegas admitted to placing vials in the bulkhead in June, 1988 to make room in his laboratory for incoming blood samples. Although he did not admit to hiding vials there on an earlier occasion, expert evidence on tides and currents established that the vials found in Staten Island could also have originated from the Admirals Walk bulkhead.

On January 31, 1991, a jury found Mr. Villegas guilty of four counts charging violations of the Clean Water Act (33 U.S.C. § 1319). All four counts are premised on the allegation that the defendant knowingly discharged pollutants into navigable waters from a "point source," a term of art established and defined by the Clean Water Act. *See* 33 U.S.C.

§ 1362(14). Two of the four convictions (Counts One and Three) are premised on the so-called "knowing endangerment" provision of this statute that imposes substantially enhanced penalties on polluters who knowingly place others "in imminent danger of death or serious bodily injury." 33 U.S.C. § 1319(c)(3).

In a post-trial motion pursuant to Fed.R.Crim.P. 29(c), Mr. Villegas challenges the sufficiency of the evidence supporting all four convictions. The motion for a judgment of acquittal is granted with respect to Counts One and Three, but denied as to Counts Two and Four.[1]

DISCUSSION

This case involves difficult questions of statutory construction that arise primarily from the effort of the United States Attorney to apply the Clean Water Act to circumstances that Congress may not have specifically contemplated when it enacted this statute. Only recently, Judge Posner aptly described the task of a judge faced with such a problem:

> When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation—it is interpretation in a sense that has been orthodox since Aristotle—for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they

[1] The defendant also argues for the first time that the proper venue for the trial of the indictment was the District of New Jersey. A claim that evidence is insufficient to sustain venue, if not raised in a pre-trial motion or as a specific basis for a judgment of acquittal at the close of the case-in-chief, is deemed waived. *See United States v. Price*, 447 F.2d 23, 27 (2d Cir.), *cert. denied*, 404 U.S. 912, 92 S.Ct. 232, 30 L.Ed.2d 186 (1971).

> thought about it more clearly or used a more perspicuous form of words.

Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir.1989), *vacated*, --- U.S. ----, 111 S.Ct. 1383, 113 L.Ed.2d 440 (1991). The interpretive task is the same whether the statute is criminal or civil in nature.

While it is often said, and sometimes held, that ambiguity in a criminal statute should be resolved in favor of a defendant, the Supreme Court has cautioned—even when construing an arguably ambiguous statute—that such statutes " 'ought not to be construed so strictly as to defeat the obvious intention of the legislature.' " *Huddleston v. United States*, 415 U.S. 814, 831, 94 S.Ct. 1262, 1272, 39 L.Ed.2d 782 (1974) (quoting *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L.Ed. 450 (1829)). Indeed, in a criminal prosecution under the Rivers and Harbors Act of 1899, the Supreme Court rejected a persuasive argument by Justice Harlan to "[apply] a seemingly straight-forward statute in a straight-forward way". *United States v. Standard Oil Co.*, 384 U.S. 224, 236, 86 S.Ct. 1427, 1433, 16 L.Ed.2d 492 (1966) (Harlan, J., dissenting). Instead, the Court broadly construed the statute in a manner consistent with its purpose. Justice Douglas, writing for the majority, observed:

> This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of

> the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history.

Id. at 225, 86 S.Ct. at 1428. *See also United States v. Republic Steel Corp.*, 362 U.S. 482, 491, 80 S.Ct. 884, 889, 4 L.Ed.2d 903 (1960). These words provide an appropriate backdrop to the questions of statutory interpretation at issue here.

The first of these relates to all four counts of the indictment. The defendant's argument is a simple one. The Clean Water Act makes it an offense for any "person" to "discharge" a "pollutant" into "navigable waters" from a "point source." 33 U.S.C. § 1311(a). The phrase "point source" is defined in part as "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). This language, the defendant argues, demonstrates that a "point source" is the structure through which pollutants are discharged into navigable waters by persons. In this case, however, the defendant deposited the vials into the Hudson River without using a conveyance of any kind. Accordingly, he argues, he cannot be found guilty of discharging pollutants from a "point source." While this argument is not without some appeal, common sense, precedent and legislative history, suggest that in certain circumstances, a person can be a "point source."

Congress has defined a "point source" as "any discernible, confined and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). This language is emphatically inclusive, as reflected in the

words "any," "discernible" and "not limited to." Moreover, use of such a highly general term as "conveyance" establishes that Congress had an expansive vision of what would constitute a point source. The word conveyance is defined simply as "a means or way of conveying." Webster's New International Dictionary 499 (3d ed. 1981). Any conduit or container of waste falls directly within this definition.

The intent of Congress in using the phrase "point source" may be even more clearly ascertained from the distinction made in the statute, and emphasized in the legislative history and the case law, between "point sources" and "non-point sources." *See* 33 U.S.C. § 1314(f); S.Rep. No. 92-414, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3705-06, 3718-19, 3744. By non-point source pollution, Congress was referring to "disparate runoff caused primarily by rainfall around activities that employ or cause pollutants." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). Indeed, Congress specifically excluded from the definition of point source "return flows from irrigated agriculture." 33 U.S.C. § 1362(14). Thus, "[t]he concept of point source was developed to distinguish pollution resulting from simple erosion over the surface of the ground from pollution that has been collected or comes from a confined system." *Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 630 (D.R.I.1990).

If the purpose of Congress in specifically proscribing pollution from a "point source" was to ensure that naturally-induced, random run-off of pollutants would not result in criminal or civil liability under the Clean Water Act, then it is difficult to find a basis for holding that a "point source" does not encompass the deliberate discharge of pollutants produced in the

course of a waste-generating activity merely because a person directly deposits those pollutants into the water. Indeed, the definition of "point source" in the Clean Water Act, even if read literally, does not exclude discharge by a person. While the words "any discernible, confined and discrete conveyance" do not conjure up the image of a human being, neither do they specifically exclude one. It is true that the examples included within the definition—"any pipe, ditch, channel, tunnel, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants may be discharged"—imply that the statutory reference is to some kind of physical container or conduit. Such an implication, however, is not dispositive. As the Supreme Court observed in *Gooch v. United States*:

> The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of the legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view.

297 U.S. 124, 128, 56 S.Ct. 395, 397, 80 L.Ed. 522 (1936); *United States v. Alpers*, 338 U.S. 680, 682, 70 S.Ct. 352, 354, 94 L.Ed. 457 (1950).

The application of the rule of *ejusdem generis* to resolve the statutory questions presented here would "defeat the obvious purpose" of the Clean Water Act which is to prevent unregulated pollution of the

navigable waters of the United States. *See* 33 U.S.C. §§ 1251, 1341-45. As the Court of Appeals for the Sixth Circuit has observed:

> "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States."

Earth Sciences, 599 F.2d at 373.

Congress was concerned with the precise manner by which pollutants are discharged into navigable waters because of its intent to exclude certain types of pollution-generating activity from the ambit of the Clean Water Act. Where, as here, that concern is not implicated, there is no reason to limit the broad definition of the words Congress employed. *Cf. Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir.1991) ("The definition of a point source is to be broadly interpreted."), *petition for cert. filed*, (Nov. 18, 1991). Surely, it is absurd to argue that the defendant should be relieved of responsibility merely because he dumped vials of poison directly into the Hudson River instead of discharging them from a pipe or other physical conveyance.

Admittedly, there is an argument to be made that use of the phrase "point source" serves the purpose of limiting the coverage of the Clean Water Act to activities that generate and dispose of pollutants on a large-scale and continuous basis. Indeed, references in the statute and the legislative history indicate that the primary focus of the Act was industrial polluters.

See 33 U.S.C. §§ 1341-45 (establishing a permit system to regulate waste discharge); S.Rep. No. 92-414, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668 (referring to "industry," "industrial sources," "facilities" and "plants"). Congress, however, did not exempt small-time, intermittent polluters from the regulatory scheme prescribed by the Clean Water Act. On the contrary, the statute defines "the discharge of a pollutant" as "*any addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). *See also United States v. St. Bernard Parish*, 589 F.Supp. 617, 621 (E.D.La.1984) (Intermittent discharges are not excluded from the Clean Water Act.).

Nevertheless, Congress did not intend the Clean Water Act to apply anytime a person throws garbage into the ocean merely because such litter may be encompassed within the broad statutory definition of a "pollutant." The scope of the Act may be limited, however, without creating arbitrary and irrational distinctions of the kind suggested by the defendant. Specifically, the phrase "point source" may reasonably be read to include any discrete and identifiable conduit or container—including a human being—designated to collect or discharge pollutants produced in the course of a waste-generating activity. This definition places the focus of the inquiry on whether a defendant was deliberately engaged in threatening the "chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), which is the object of the Clean Water Act, and not whether the conduit for such activity was a human being or an inanimate structure.[2]

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[2] During a post-trial argument, even the defendant's attorney appeared to adopt an analysis close to that suggested here:

The parties have framed the essential issue in this case as whether a person can be a "point source" and the issue has been addressed as so framed. At least as to Counts One and Two, however, there is an independent basis for concluding that the defendant discharged the blood vials from a "point source." Whether or not Mr. Villegas himself was a "point source," it is quite clear that the rocks forming the bulkhead at Admirals Walk come within the definition of that phrase. The crevices of the bulkhead literally constitute "discrete fissure[s]," one of the definitions of a point source specifically provided by the Clean Water Act. 33 U.S.C. § 1362(14). Indeed, the cases have consistently found that structures comprised of natural materials with the physical capacity to hold "pollutants" constitute point sources. *See Dague*, 935 F.2d at 1354-55 (a culvert is a point source); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1401 (D.N.H.1985) (a ditch is a point source); *Earth Sciences*, 599 F.2d at 374 (ditches form part of a point source); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C.Cir.1982) (a dam can be a point source). The capacity and function of the structures in these cases cannot be distinguished from the crevices in the rocky facade of the bulkhead that held

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> The Court: [I]s it your argument that it's not a point source because he only did it twice?
>
> Ms. Shevitz: It's my argument that it's not a point source because the car, the defendant, was not a confined, discrete source of pollution in terms of the ongoing nature of that plant.... In other words, if they regularly discharged their waste through a car that regularly drove from here to there, then I would say, okay, maybe that's an incident of the business, and that's a point source of that ongoing plant activity, ...

Post-trial Hearing Tr. at 85.

the defendant's blood vials. Finally, even if the bulkhead does not constitute a "point source," the very containers holding the blood vials and hidden in the rocky facade come directly within the definition of that phrase. 33 U.S.C. § 1362(14) (point source is a "container").[3]

The defendant next argues that even if he is guilty of discharging pollutants from a "point source," the evidence is insufficient to support his convictions on Counts One and Three of the indictment. These counts charge violations of the knowing endangerment provision of the Clean Water Act that reads as follows:

> Any person who knowingly violates section 1311 . . . of this title, . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not

[3] The defendant argues that the containers and vials found at the Admirals Walk bulkhead in September, 1988, cannot provide the basis for a conviction because the point in the bulkhead at which they were found is above the normal high tide line. There was sufficient evidence, however, for the jury to conclude that the defendant knew that the vials would ultimately be washed into the water. Moreover, even if valid, this argument would affect only Counts One and Two. There is no evidence as to precisely how the vials that washed ashore on Staten Island in May, 1988 were discharged into the Hudson River. Under these circumstances, the jury could infer that the vials were either placed directly in the water or in the bulkhead below the normal high tide line. Because the defendant's sentence will be the same whether or not the convictions on Counts One and Two stand, there is no need to address the validity of the defendant's argument on this point. *See Barnes v. United States*, 412 U.S. 837, 848, 93 S.Ct. 2357, 2364, 37 L.Ed.2d 380 (1973); *Benton v. Maryland*, 395 U.S. 784, 791, 89 S.Ct. 2056, 2060, 23 L.Ed.2d 707 (1969).

> more than $250,000 or imprisonment of not more than 15 years, or both.

33 U.S.C. § 1319(c)(3)(A). Under this section, the United States Attorney must prove that the defendant discharged pollutants from a point source, and that in doing so, he knew he was placing another person in imminent danger of death or bodily injury. The defendant argues that there is insufficient evidence to prove that when he placed the vials in the Hudson River he knew that he was thereby placing another person in "imminent danger of death or serious bodily injury."

Under the Clean Water Act's knowing endangerment provision, a person acts with the requisite degree of knowledge if he possesses "actual awareness" or an "actual belief" that he is placing another person in imminent danger. 33 U.S.C. § 1319(c)(3)(B). Circumstantial evidence may be used to prove either mental state. *Id.* Only one reported case refers to the Clean Water Act's knowing endangerment provision and it does not apply or further define the knowledge element. *See United States v. Rutana*, 932 F.2d 1155 (6th Cir.), *cert. denied*, --- U.S. ----, 112 S.Ct. 300, 116 L.Ed.2d 243 (1991).

The legislative history of the section, however, does address the issue. The Senate Environment and Public Works Committee emphasized the deliberate omission from § 1319(c)(3) of the definition of knowledge found in an analogous provision in the Resource Conservation and Recovery Act (RCRA). S.Rep. No. 99-50, 99th Cong., 1st Sess., at 30 (1985). Under the RCRA, "a person's state of mind is knowing with respect to a result of his conduct, if he is aware or believes that his conduct is *substantially certain* to cause danger of death or serious bodily injury." 42 U.S.C. § 6928(f)(1)(C) (emphasis added). According

to the Senate Report, this language was left out of the Clean Water Act because it tended to "discourage prosecutions." S.Rep. No. 99-50, 99th Cong., 1st Sess., at 30 (1985). Instead, the Senate Committee intended that knowledge in the knowing endangerment provision of the Clean Water Act be "measured against the standard established by prevailing case law, as it is for any other Federal crime sharing the same state of mind element." *Id.*

The omission in the Clean Water Act of the RCRA's "substantial certainty" language, combined with the reference in the legislative history to the "standard established by prevailing case law," leaves unclear precisely what evidence is necessary to sustain a conviction under 33 U.S.C. § 1319(c)(3). There does not appear to be any "prevailing [federal] case law," defining knowledge in this particular context. The Model Penal Code, the culpability standards of which have been adopted or used as a guide in numerous jurisdictions, *see* 1 Charles E. Torcia, Wharton's Criminal Law 137-40 (1978), provides that when knowledge of the result of one's conduct is an element of an offense, such knowledge is established if a person "is aware that it is *practically certain* that his conduct will cause such a result." Model Penal Code § 2.02(2)(b)(ii) (1962) (emphasis added). Moreover, one year after Congress amended the criminal provision of the Clean Water Act to include the knowing endangerment section, it enacted the Medical Waste Tracking Act. This Act also contains a knowing endangerment section that imposes enhanced penalties on violators who knowingly place another person in imminent danger of death or serious bodily injury. *See* 42 U.S.C. § 6992d(c). The knowing endangerment section of the Medical Waste Tracking Act, however expressly returns to the

knowledge standard of the RCRA, requiring proof that the defendant "is aware or believes that his conduct is *substantially certain* to cause danger of death or serious bodily injury." *Id.* ("The terms of this paragraph shall be interpreted in accordance with the rules provided under § 6928(f) of this title") (emphasis added).[4]

The United States Sentencing Commission has taken a similar approach in formulating the guidelines for the offense at issue here. The Commission provided for an eleven level increase from the base level offense of discharging or mishandling environmental pollutants "[i]f the offense resulted in a substantial likelihood of death or serious bodily injury," United States Sentencing Commission, *Guidelines Manual*, § 2Q1.3 (Nov. 1991), and *if* the defendant knew that his discharge of pollutants would have this effect. *Id.*, at Comment. (n. 3).

Although the "substantially/practically certain" standard appears to be the predominant definition of knowledge with respect to the result of conduct, some states have opted for a "high probability" standard. In Montana, for example, the criminal code defines knowledge with respect to the result of conduct as being "aware that it is *highly probable* that such result will be caused" by the conduct. Mont.Code Ann. § 45-2-101(33) (1990) (emphasis added). A similar definition was adopted in *Armour v. State of Indiana*, 479 N.E.2d 1294 (Ind.1985), which involved the application of a child neglect statute that made it a crime to

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[4] Two federal statutes that impose sanctions for certain foreign trade practices also define knowledge of the result of conduct as being aware that "such result is *substantially certain* to occur." 15 U.S.C.S. § 78dd-1(f)(2)(A)(i) (Law Co-op 1991); 15 U.S.C.S. § 78dd-2(h)(3)(A)(i) (Law Co-op 1991) (emphasis added).

knowingly put a "dependent in a situation that may endanger his life or health." Ind.Code Ann. § 35-46-1-4 (Burns 1990). The Supreme Court of Indiana held that a defendant could be found guilty of violating the statute only if he was "subjectively aware of a *high probability* that he placed the dependent in a dangerous situation." *Armour*, 479 N.E.2d at 1297 (emphasis added). *See also Caldwell v. State of Indiana*, 497 N.E.2d 610 (Ind.Ct.App. 1986); *Ware v. State of Indiana*, 441 N.E.2d 20 (Ind.Ct.App.1983).

Significantly, the "high probability" standard also tracks the language of the Model Penal Code as it defines knowledge of a fact inferred from a person's conscious avoidance of that fact. The Code states that "when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a *high probability* of its existence, unless he actually believes it does not exist." Model Penal Code § 2.02(7) (1962) (emphasis added). The Supreme Court has expressly approved this language, *see Leary v. United States*, 395 U.S. 6, 46 n. 93, 89 S.Ct. 1532, 1553 n. 93, 23 L.Ed.2d 57 (1969), and it has been consistently accepted by the Court of Appeals for the Second Circuit. *See, e.g., United States v. Gurary*, 860 F.2d 521 (2d Cir.1988), *cert. denied*, 490 U.S. 1035, 109 S.Ct. 1931, 104 L.Ed.2d 403 (1989); *United States v. Gatzonis*, 805 F.2d 72 (2d Cir.1986), *cert. denied*, 484 U.S. 932, 108 S.Ct. 303, 98 L.Ed.2d 262 (1987); *United States v. Reed*, 790 F.2d 208 (2d Cir.), *cert. denied*, 479 U.S. 954, 107 S.Ct. 445, 93 L.Ed.2d 393 (1986).

The "high probability" standard provides a viable alternative to the "substantial certainty" test that Congress apparently rejected when enacting the Clean Water Act's knowing endangerment provision. It allows for conviction on proof less than knowledge

of a substantial certainty of imminent danger, while also setting a sufficiently rigorous standard to justify the stiff criminal penalties that attach pursuant to § 1319(c)(3). More significantly, it is consistent with the language of 33 U.S.C. § 1319(c)(3) that provides for an enhanced sentence only where "at [the] time" the defendant discharges a pollutant into navigable waters he "knows . . . that he thereby places another person in imminent danger of death or serious bodily injury."

These words imply that the discharge must actually place another person in imminent danger of death or serious bodily injury and not merely that such result be a "potential" consequence of the defendant's act. *See* Govt.Br. at 40. Indeed, unless so read, the word "imminent" has no meaning at all. Cases have held that the phrase "imminent danger" does not mean immediate danger. *Dague*, 935 F.2d at 1355-56. Because the word danger means risk or peril, Webster's New International Dictionary 573 (3d ed. 1981), the phrase "imminent danger" must connote something more than the mere possibility or risk that death or serious bodily injury is a foreseeable consequence of a discharge. Thus, at the very least, "imminent danger" must mean danger that is a highly probable consequence of a discharge. *Cf.* United States Sentencing Commission, *Guidelines Manual*, § 2Q1.3 (Nov. 1991). It is this particular level of danger that the defendant must have known existed when he discharged the blood vials into the Hudson River.[5] *Id.* at Comment. (n. 3).

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[5] When this issue first arose at trial, at a point when there was little opportunity for careful research and review, I held that a lesser degree of probability would suffice. Upon reconsideration, I conclude otherwise. If I am now correct in concluding that the defendant must have been aware that it

The United States Attorney offered three sources of testimony on the element of the defendant's knowledge. Elena Ramos, a former data entry employee at Plaza, testified that Mr. Villegas had worked in two laboratories that handled blood before becoming co-owner and vice-president of marketing at Plaza. She also testified that Mr. Villegas handled blood samples regularly and took precautions when doing so. Shahid Mustaquim, a former medical technologist at Plaza, testified that between 35-50% of the blood specimens brought there were tested for hepatitis. He further stated that Plaza has set aside a separate area and a separate machine for hepatitis testing. Dr. Sashikale Krishnan, former director of pathology at Plaza, confirmed that Plaza conducted a great deal of testing for diseases like hepatitis and leukemia. He also stated that Mr. Villegas was one of two people in charge of Plaza, that he co-authored the laboratory's safety manual, which included guidelines for handling blood, and that these guidelines were followed by Plaza employees.

This evidence is sufficient to support a jury finding that the defendant acted with knowledge of the dangers of hepatitis, and that some of the discharged vials contained hepatitis-infected blood. The evidence, however, does not support the conclusion that when he placed the vials in the Hudson River, Mr. Villegas knew there was a high probability that he was thereby placing another person in imminent danger of death or serious bodily injury. Of particular

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was highly probable that his conduct would cause serious bodily injury or death, but wrong in my evaluation of whether the evidence here is sufficient to meet that standard, I would grant the defendant's motion for a new trial pursuant to Fed.R.Crim.P. 33 because my instructions to the jury were erroneous. *See* Fed.R.Crim.P. 29(d).

significance is the testimony of Dr. Alfred M. Prince, an expert in virology called by the United States Attorney. Dr. Prince suggested that the principal risk of hepatitis infection as a result of exposure to a vial of contaminated blood would arise "[i]f that vial is broken and if a piece of broken glass were to penetrate the skin . . ." Trial Tr. at 362. While Dr. Prince testified that the likelihood of contamination in those circumstances was "very high," *id.*, he also testified that the risk of this happening was "low":

> The Court: Doctor, if three or four or five vials like—of the kinds we have been talking about were dropped in the Hudson River, would you say that that would place any person in imminent danger of death or serious bodily injury?
>
> Dr. Prince: If those vials were to land on the shore and someone were to step on them and puncture their skin, they would be in danger of infection, hepatitis B, yes. Those vials that were infected, of course. They all were not.
>
> The Court: Of course, one would have to know that that was going to happen. Or sooner or later everything floats to shore?
>
> Dr. Prince: The risk of this happening is low but it is a risk.

Trial Tr. at 371.

This testimony was elicited outside the presence of the jury, and the defendant's trial counsel declined an invitation to have it repeated to the jury.[6] Never-

[6] Wayne Pizzuti, another prosecution expert, testified in the presence of the jury that it was also unlikely that a person swimming in the area where a vial had broken would contract hepatitis B. Trial Tr. at 356.

theless, the testimony does suggest the need for caution in inferring that the defendant must have known that he was placing another person in imminent danger of death or serious bodily injury merely because he knew that the vials contained a dangerous virus. Yet this is essentially the theory underlying the prosecution's case. The Assistant United States Attorneys trying the case argued that "from the evidence regarding the currents and tides the jury could infer that the defendant knew or should have known that the—anything thrown into [the] waters would be swept out into the sea and eventually be lodged on a beach," and that the defendant "knew that people walked on the rocks [at] Edgewater." Trial Tr. at 391. Consequently, they argued, the defendant should have been aware of the risk to those who walk along Hudson River beaches or climb on the Admirals Walk bulkhead.

There was, however, no evidence introduced at trial showing that the defendant knew "that people walked on the rocks [at] Edgewater" where the vials were hidden, or that such activity even occurs. Moreover, there was no evidence introduced that showed the defendant's knowledge of the tides and, specifically, that the vials would be swept out into the sea and eventually wash ashore in an area where they could cause the kind of injury Dr. Prince described. Indeed, if Dr. Prince, an expert in virology who has a more sophisticated understanding of these matters than Mr. Villegas, viewed the danger of such serious bodily injury or death as remote, it is hard to know why Mr. Villegas should have known it to be highly probable or even likely.

There is no doubt that the defendant's conduct was irresponsible and that it had the potential to cause serious bodily injury. These factors may provide a

basis for an upward adjustment of the guideline range applicable to the offense of discharging pollutants into the water. *See* United States Sentencing Commission, *Guidelines Manual*, § 2Q1.3, comment. (n. 4) (Nov. 1991). The evidence, however, is insufficient to justify the enhanced penalties provided for cases where a polluter knows that there is a high probability that he is placing another person in imminent danger of death or serious bodily injury.

CONCLUSION

Accordingly, the defendant's motion pursuant to Fed.R.Crim.P. 29(c) is granted with respect to Counts One and Three and denied with respect to Counts Two and Four.

So Ordered.

APPENDIX C

UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF NEW YORK

No. 89 CR 338

UNITED STATES OF AMERICA, PLAINTIFF

v.

GERONIMO VILLEGAS, DEFENDANT

JURY CHARGE

[1/31/91 Tr. 456-477]

[456] THE COURT: Ladies and gentlemen, now that the evidence in the case has been presented and the attorneys for government and the defendant have concluded their closing arguments, it is my responsibility to instruct you as to the law that governs this case. My instructions will be in three parts.

First, I will instruct you regarding the general rules that define and govern the duties of a jury in a criminal case.

Second, I will instruct you as to the legal elements of the crimes charged in the indictment. That is, the specific [457] elements that the government must

prove beyond a reasonable doubt to warrant a finding of guilt.

And third, some general rules regarding your deliberations following these instructions.

To begin with, it is your duty to find the facts from all the evidence in the case. You are the sole judges of the facts and it is therefore for you and you alone to pass upon the weight of the evidence, to resolve such conflicts as may have appeared in the evidence and to draw such inferences as you deem reasonable and warranted from the evidence.

With respect to any question concerning the facts, it is your recollection of the evidence that controls.

You must apply the law in accordance with my instructions to the facts as you find them. While the lawyers may have commented on some of these rules, you must be guided only by what I instruct you about them. You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them.

The fact that this prosecution is brought in the name of the United States Government does not entitle the United States to any greater consideration than the defendant in this case. By the same token, it is entitled to no less consideration. Both parties, the United States Government and [458] the defendant, are equal before this Court and they are entitled to equal consideration. Neither the government nor the defendant is entitled to sympathy or favor.

I instructed you earlier that the indictment filed against the defendant is simply the means by which the government gives notice to the defendant of the charges against him and brings him before the court. It is an accusation and nothing more. The indictment

is not evidence and you are to give no weight to it in arriving at your verdict.

The defendant in summons to the indictment has pleaded not guilty. He's presumed to be innocent until his guilt has been proved beyond a reasonable doubt and that presumption alone, unless overcome, is sufficient to acquit him. The defendant is presumed innocent until you, the jury, decide unanimously that the government has proved him guilty beyond a reasonable doubt.

Since the law presumes the defendant to be innocent, the burden of proving him guilty beyond a reasonable doubt is on the government throughout the trial. A defendant never has the burden of proving his guilt or innocence or of producing any evidence at all.

Proof beyond a reasonable doubt does not mean proof beyond all the doubt. It is not necessary for the government to prove the guilt of a defendant beyond all possible doubt. The test is one of reasonable doubt.

[459] A reasonable doubt is a doubt based on reason and common sense, the kind of a doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

A reasonable doubt, however, is not a doubt that arises out of whim or speculation. A reasonable doubt is not an excuse to avoid the performance of an unpleasant duty.

If, after a fair and impartial consideration of all the evidence in the case, or the lack of evidence, you can honestly say that you have such a doubt as would cause prudent persons to hesitate to act in matters of importance in their lives, then you have a reasonable

doubt and, and [*sic*] that event, it is your duty to acquit.

If, on the other hand, after a fair and impartial consideration of all the evidence, you can honestly say that you have such an abiding belief in the guilt of the defendant that you would be willing to act upon a similar strong conviction in important matters in your own lives, then you have no reasonable doubt, and, in that circumstance, you should convict.

I wish to instruct you now as to what the evidence is and how you should consider it.

The evidence upon which you are to decide what the [460] facts are comes in several forms.

Sworn testimony of witnesses, both on direct and on cross-examination, regardless of who called the witness.

Exhibits that have been received into evidence.

Facts to which all the lawyers have agreed or stipulated. You have heard a number of stipulations read to you.

What is not evidence?

Certain things are not evidence and are to be disregarded by you in deciding what the facts are.

Arguments or statements by lawyers are not evidence.

Questions put to witnesses are not evidence.

Objections to questions or to offered exhibits are not evidence.

In this case, attorneys have a duty to their clients to object when they believe evidence should not be received. You should not be influenced by the objection or my ruling on it. If the objection was sustained, ignore the question and any answer that that [*sic*] may have followed. If the objection was overruled, you should treat the answer like any other answer.

Testimony that has been excluded, striken [*sic*] or that you have been instructed to disregard is not evidence and must be disregarded.

Obviously anything you may have seen or heard outside the courtroom is not evidence.

[461] Nothing that I have said or done should be used by you in inferring guilt or innocence. I have no view of the guilt or innocence of this defendant and even if I did convey any view to you, it would be your obligation to disregard it.

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence. It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendant's race, religion, national origin, ethnic background, sex or age. All persons are entitled to the presumption of innocence and the government has the same burden of proof in all cases.

It would be equally improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process.

To repeat, your verdict must be based exclusively upon the evidence or lack of evidence in the case.

You are the sole judges of the credibility of the witnesses and the weight that their testimony deserves. Any assumption that a witness will speak the truth may be dispelled by the appearance and conduct of the witness, by the manner in which the witness testifies, by the character of the testimony given, or by the evidence contrary to the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness

has [462] testified, and other matters in evidence which tend to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive, state of mind, partisanship in the prosecution or defense of the case and his or her demeanor while on the stand.

The testimony of a witness may be discredited or impeached by showing that he or she previously made statements which are inconsistent with their present testimony. It is your province to determine the credibility, if any, to be given the testimony of a witness who has been so impeached.

If a witness is shown knowingly to have testified falsely concerning any material fact, you have a right to dismiss such witness' testimony in other particulars and you may reject all the testimony of that witness or you may accept whatever part of it you think deserves to be believed.

You may consider any demonstrated bias, prejudice or hostility of a witness in determining the weight to be accorded his testimony.

You have heard the testimony of government agents, both state and federal. The testimony of such agents should be evaluated by you in the same manner as you would evaluat [*sic*] the credibility of any other witness.

The law does not require the government to call as witnesses all persons who may have been present at any time or place involved in this case, or who may appear to have some [463] knowledge of the matters at issue in this trial. The law does not require the government to produce as evidence all matters and things mentioned during the course of the trial. The law further does not require that any particular techniques be used by law enforcement authorities to uncover or prosecute crime.

Evidence has been introduced as to the involvement of certain other individuals who have not been indicted. That these individuals are not on trial before you is not a matter of concern to you. You should not speculate as to the reason—as to why these individuals or corporations are not on trial before you and you should not allow this to control or influence your verdict.

You have heard the testimony of so-called expert witnesses in this case. Ordinarily, opinions of witnesses are not received in evidence. However, opinions of expert witnesses, qualified by training and experience in a particular field of specialized learning, are received in evidence. The expert witness is permitted and expected to give you the reasons for and the basis of his or her opinion. You should weigh and evaluate the testimony of an expert witness precisely as you weigh the testimony of any other witness. The relationship between a party and its expert witness is a factor you may consider in judging the credibility and weight to be given to the testimony of that witness. Such a relationship, however, does not mean that the witness was untruthful. The [464] opinion stated by the experts who testified before you are based on particular facts, as the expert himself observed and testified to them before you, or as the attorney who questioned him asked him to assume. You may reject his opinion if, after careful consideration of all the evidence in the case, expert or other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by the other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is given to you to assist you in reaching a proper

verdict. It is entitled to such weight as you find the expert's qualifications in his field warrant and may be considered by you, but is not controlling on your judgment.

The defendant did not testify in this case. Under our Constitution, he has no obligation to testify or to present any evidence because it is the prosecution's burden to prove him guilty beyond a reasonable doubt. That burden remains with the prosecution throughout the entire trial and it never shifts to the defendant. The defendant is never required to prove that he is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any [465] way in your deliberations in the jury room.

Ladies and gentlemen, I will now turn to the second part of this charge. I will, as I indicated at the outset, instruct you as to the legal elements of the crimes charged in the indictment. That is to say, I will now instruct you as to the specific elements of the crimes charged that the government must prove beyond a reasonable doubt to warrant a finding of guilt in this case.

The defendant is charged with four counts. Each count must be considered separately by you. You may find the defendant guilty of one count without necessarily finding him guilty of any other count. Whether you find the defendant guilty or not guilty of any or all of the counts, your verdict must be unanimous.

Counts Two and Four charge the defendant with the crime of knowingly discharging pollutants from a point source into the navigable waters of the United

States without a permit in violation of the federal Clean Water Act. Counts One and Three charge the defendant with knowingly placing another person in imminent danger of death or serious bodily injury by such discharge of pollutants, including pollutants infected with a contagious virus.

Before proceeding to define, separately, the elements of each of these four counts, I wish to discuss one element which is common to all four counts of the indictment and which [466] the government must establish beyond a reasonable doubt. Before a defendant may be found guilty of knowingly discharging pollutants from a point source into the navigable waters of the United States without a permit or of knowingly placing another person in imminent danger of death or serious bodily injury by discharging pollutants infected with a contagious virus, the government must prove that the defendant knew that he was discharging such pollutants into the navigable waters of the United States.

In determining whether the government proved the requisite element of knowledge, you may consider all the facts and circumstances and the inferences which could logically be drawn. An act is done knowingly if done voluntarily and intentionally and not because of ignorance, mistake or accident. Knowledge ordinarily may be not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's knowledge from the surrounding circumstances. In determining the issues of knowledge, therefore, you may consider any statement made to or by the defendant or acts done by the defendant. You may scrutinize the entire conduct of the defendant at or near the time of the alleged offenses, if that helps you to determine the defendant's state of mind.

It is not necessary for the government to prove that the defendant knew that a particular act or failure to act was [467] a violation of the law or that the defendant had any specific knowledge of the particular regulatory limits imposed by the Clean Water Act.

I will now proceed to discuss the counts separately, and the additional elements which must be proven beyond a reasonable doubt.

Count one of the indictment reads as follows:

On or about and between April 1, 1988 and September 25, 1988, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant Geronimo Villegas, knowingly and without a permit, and knowing at the time that he thereby placed another person in imminent danger of death or serious bodily injury, did discharge and cause to be discharged pollutants infected with a contagious virus from a point source into the Hudson River and the New York Bay, navigable waters of the United States, to wit, on or about and between the dates stated above, the defendant discharged and caused to be discharged into the Hudson River and the New York Bay two plastic containers containing numerous blood vials, many of which were broken; one plastic zip-lock bag containing approximately 18 blood vials and one urine vial; one plastic bag containing 27 blood vials; and a container among 22 loose blood vials, including five glass vials containing human blood infected with hepatitis virus.

Count Three of the indictment—and for these [468] purposes, I am going to skip Count Two, just for the sake of clarity. Count three of the indictment reads as follows:

On or about and between April 1, 1988 and May 26, 1988, both dates being approximate and inclusive,

within the Eastern District of New York and elsewhere, the defendant Ger nimo Villegas, knowingly and without a permit, and knowing at the time that he thereby placed another person in imminent danger of death or serious bodily injury, did discharge and cause to be discharged pollutants infected with a contagious virus from a point source into the Hudson River and the New York Bay, navigable waters of the United States, to wit, on or about the dates stated above, the defendant discharged and caused to be discharged into the Hudson River and the New York Bay 51 glass vials containing human blood, including five glass vials containing human blood infected with the hepatitis virus and bearing labels with the following identification numbers:

16023, 18053, 18068, 25057, and 25067.

To find the defendant guilty of Counts One and Three of the indictment, you must find the following facts beyond a reasonable doubt:

First, that the defendant knew that he was discharging pollutants into the navigable waters of the United States without a permit.

Second, that the defendant discharged, or caused to be discharged, a pollutant from a point source.

[469] The term "discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source. The term "pollutant" means substances including solid waste, garbage, chemical wastes, biological wastes, wrecked or discarded equipment and industrial, municipal and agricultural waste discharged into water. You are instructed as a matter of law that a glass vial containing human blood and a plastic container both are pollutants under the Clean Water Act.

The term "navigable waters" means the waters of the United States. The term "waters of the United

States" includes: All waters, such as intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, natural ponds, the use, degradation or destruction of which would affect interstate or foreign commerce. You are instructed as a matter of law that the Hudson River and the New York Bay are navigable waters of the United States.

The statute also specifies that only discharges without a permit from so-called "point sources" are prohibited. Congress chose to distinguish between "point sources" and "non-point sources" with the specific purpose of excluding various kinds of pollution runoff, that is, runoff produced principally by rainfall that cannot be traced to one polluter. Congress did not intend to exempt from regulation any activity that emits pollution from an identifiable point. Congress did not intend by the term "point source" to [470] distinguish between a person who drives a truck to the edge of the Hudson River and dumps blood vials, clearly a point source, and a person who gets out of the truck, takes the vials from the truck, walks to the river's edge and dumps them from his hand. Removing pollutants from a container, and a vehicle is a container, parked next to a navigable body of water and physically throwing the the [*sic*] pollutant into the water constitutes a discharge from a point source.

In this respect, I ask to you [*sic*] forget and disregard the testimony of Patrick Durack on this issue.

Third, that the pollutant entered the navigable waters of the United States.

The government is not required to prove that the introduction of a pollutant caused any damage or harm in order to establish the offense charged under the federal Clean Water Act.

And fourth, that the defendant had no permit to discharge the pollutant.

It is a violation of the Clean Water Act to discharge a pollutant into the navigable waters of the United States without a permit. The United States alleges that the defendant Geronimo Villegas did not have such a permit at the times relevant to this case. In order to satisfy this element of the crime, the government need only show that the defendant Geronimo Villegas did not have, at the time of the discharge, a [471] written permit issued by the United States Environmental Protection Agency to discharge pollutants into the waters of the United States.

The fifth element of this crime charged in Count One and Three is that you must—the government must prove, you must find, that by discharging the pollutant, the defendant placed another person in imminent danger of death or serious bodily injury. The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

It is not necessary for the government to prove that death or serious bodily injury actually occurred. The government must prove, however, that the defendant knew that he was placing someone in imminent danger of serious bodily injury. Imminent danger means the existence of a condition which could reasonably be expected to cause death or serious physical harm unless the condition is remedied. While the danger must be an immediate result of the conduct, the existing danger may involve a harm which may not ultimately ripen into death or serious bodily injury.

The sixth and final element of the offenses alleged in Counts One and Three, which the government must prove beyond a reasonable doubt, is that the defendant actually knew or [472] believed that his conduct placed another person in imminent danger of death or bodily injury.

Specifically, the government must establish beyond a reasonable doubt, one, that the defendant knew that the substances in the blood vials contained viruses that could cause death or serious bodily injury if they entered the human body; and two, that he also knew or believed that by placing the blood vials in the water, it was more likely than not that the viruses contained in the vials would infect another person and cause that person death or serious injury.

In determining whether the defendant was aware or believed that his conduct was more likely than not to cause imminent danger of death or serious bodily injury, you must find that the defendant was actually aware or believed that the danger was more than merely a possible result of the defendant's conduct. The defendant is responsible only for actual awareness or actual belief that he possessed; and knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant; except that in proving the defendant's actual knowledge, as I have indicated at the outset, circumstantial evidence may be considered.

While the government must prove that the defendant knew that his conduct placed another person in imminent danger of debt did [*sic*] or serious bodily injury, the government does not [473] have to prove that the defendant actually intended or desired that harm come to any person. In other words, the government need not prove that he willed that harm come to a person. Rather, the government must

prove that he was willing to put a person in danger as a consequence of his conduct.

I will now read Counts Two and Four of the indictment.

As you will see, they mirror Counts One and Three, with the exception that they do not charge the defendants [*sic*] with knowingly placing the life of another person in danger of death or serious injury.

Count Two of the indictment reads as follows:

On or about and between April 1, 1988 and September 25, 1988, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant Geronimo Villegas, knowingly and without a permit, did discharge and cause to be discharged pollutants from a point source into the Hudson River and the New York Bay, navigable waters of the United States, to wit, on or about the dates stated above, the defendant discharged and caused to be discharged into the Hudson River and the New York Bay two plastic containers containing numerous blood vials, many of which were broken; one plastic zip-lock bag containing approximately 18 blood vials; and one urine vial, one plastic bag containing 27 blood vials with an identification number; [474] and a container among 22 loose blood vials.

Count Four: On or about and between April 1, 1988 and May 26, 1988, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant Geronimo Villegas, knowingly and without a permit, did discharge and cause to be discharged pollutants from a source into the Hudson River and the New York Bay, navigable waters of the United States, to wit, on or about the dates stated above, the defendant discharged and caused to be discharged into the Hudson River and

the New York Bay, 51 glass vials, each containing human blood and bearing a label with an identification number.

To find the defendant guilty of Counts Two and Four of the indictment, you must find the following facts or elements beyond a reasonable doubt.

Here I summarize because they are the same, these four elements are the same first four elements for Counts One and Three.

Counts One and Three have two additional elements that I have already defined for you relating to the knowledge that the conduct caused, could put — could place in imminent danger of death or serious bodily injury another person.

First, that the defendant knew that he was discharging pollutants into the navigable waters of the United States without a permit.

[475] Second, that the defendant discharged, or caused to be discharged, a pollutant from a point source.

Third, that the pollutant entered the waters of the United States.

Fourth, that the defendant had no permit to discharge the pollutant.

Ladies and gentlemen, I have concluded that portion of my charge dealing with the elements of the crimes charged. I come to a few brief and final words relating to instructions for your deliberations.

You are entitled to your own opinion but you should exchange views with your fellow jurors and listen carefully to each other. While you should not hesitate to change your opinion if you are convinced that another opinion is correct, your decision must be your own.

Under your oath as jurors, you cannot allow a consideration of the sentence which may be imposed

upon a defendant to enter into your deliberations or to influence your verdict in any way. In the event of a conviction, the duty of imposing sentence rests solely with me.

In your deliberations you are not to consider whether you approve or disapprove of the satutues [*sic*] which this defendant is charged with violating.

The only question for you to consider is whether the government has proved beyond a reasonable doubt the essential [476] elements of the crimes charged as I have explained them.

The charges here are most serious. A just determination of this case is important to the public; it is equally important to the defendant.

If it becomes necessary during your deliberations to communicate with me, you may send a note by a marshal who will be seated outside your door, signed by your foreperson, or one or more members of the jury. No member of the jury should ever attempt to communicate with me by any means other than a signed writing; and I will never communicate with any member of the jury on any subject touching on the merits of the case, otherwise than in writing, or orally here in open court.

If you wish to have some portions of the testimony or these instructions repeated, you may make the request by a note to the marshal, and I will then call you back into the courtroom and have them read to you. I suggest, however, that you be specific with respect to the testimony that you wish to have reread so that we don't spend time reading testimony to you that you do not wish to hear.

Also, it may take a few moments to locate the testimony that you wish to hear, so if there is not an immediate response you will know that we are looking for the answer.

Similarly, if you wish to see any of the exhibits in the evidence, you may make the request by note to the marshal [477] and I will send the exhibit to you.

You will note from the oath about to be taken by the marshal that he too, as well as other persons, is forbidden to communicate in any way or manner with any member of the jury on any subject touching on the merits of the case.

Bear in mind also that you should not reveal to any person, not even to me, how you stand on the question of guilt or innocence of the accused, until after you have reached a unanimous verdict.

Any verdict you reach on any counts of the indictment, whether that verdict is guilty or not guilty, must be a unanimous verdict.

Your oath, ladies and gentlemen, that you took only a few days ago, sums up your duty, and that is, without fear or favor you will well and truly try the issues between these parties according to the evidence given to you in court and the laws of the United States.

Come up to the sides bar.

(Side bar follows.)

* * * * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No.: 92-1090(L)
92-1091

UNITED STATES OF AMERICA, APPELLEE-CROSS-APPELLANT

v.

PLAZA HEALTH LABORATORIES, INC., DEFENDANT

GERONIMO VILLEGAS, DEFENDANT-APPELLANT-CROSS-APPELLEE

[Dec. 3, 1993]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **Appellee USA**.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:

/s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX E

STATUTORY PROVISIONS

Section 301 of the Clean Water Act, 33 U.S.C. 1311, provides in pertinent part:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

Section 309 of the Clean Water Act, 33 U.S.C. 1319, provides in pertinent part:

§ 1319. Enforcement

* * * * *

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit

issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section

1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine or not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine or not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another per-

son in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental facility.

* * * * *

Section 502 of the Clean Water Act, 33 U.S.C. 1362, provides in pertinent part:

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage,

sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term

does not include agricultural stormwater discharges and return flows from irrigated agriculture.

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ORIGINAL

Supreme Court, U.S.
FILED
MAY 31 1994
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93-1572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

GERONIMO VILLEGAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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44 pp

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that at least under the rule of lenity, respondent's conduct -- placing refuse vials of blood, some contaminated with hepatitis B, which he had taken home from his blood lab, in the bulkhead at the apartment complex in which he lived -- was conduct which, though unsavory and unjustifiable, was not criminally prosecutable under the Clean Water Act, 33 U.S.C. § 1311(a) and § 1319(c), in that the Act outlaws only "discharges" from "point sources" -- a term which the Act's language and structure show to refer to fixed outlets of pollutants at fixed industrial or municipal plants, not random individual polluters or their personal automobiles.

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In the Supreme Court of the United States
October Term, 1993

UNITED STATES OF AMERICA, Petitioner

v.

GERONIMO VILLEGAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Geronimo Villegas respectfully submits this Brief in Opposition to the Petition of the Solicitor General for a writ of certiorari.

STATEMENT OF THE CASE

This case arose from the irresponsible conduct of Respondent Geronimo Villegas in disposing of blood vials, some of which were contaminated with the hepatitis B virus, in some rocks forming a bulkhead at the apartment building at which Villegas lived, adjacent to the Hudson River. Respondent was criminally prosecuted under the Clean Water Act, 33 U.S.C. § 1251 et seq., on the theory that a "discharge" of these "pollutants" had occurred "from" a "point source" into navigable waters.

Partly granting respondent's post-verdict motions,[1] Hon. Edward R. Korman set aside the convictions premised on the so-called "knowing endangerment" provision of the Act, 33 U.S.C. § 1319(c)(3), on the ground that respondent was not shown to have "known" of any danger, much less an "imminent" one, and that indeed, there was no "imminent" danger. However, the district court sustained the verdicts on the charges under 33 U.S.C. § 1319(c)(2), prohibiting "knowing" discharges, but only by adopting the unprecedented holding that a human being is a "point source" under the Act.

A. The Evidence At Trial: On two occasions, once before May 1988 and once before September 1988, respondent Villegas, then part-owner of a blood laboratory, was shown to have placed a number of vials of blood (including five found to contain blood infected with the hepatitis B virus) in the bulkhead behind the condominium complex in New Jersey, which is where Villegas lived. A maintenance superintendent who noticed the vials in a container between the rocks of the bulkhead separating the buildings from the Hudson River testified that the night before he saw the vials, the water had come "[h]igher" than he had ever seen it before (Tr. 73, 83), not only covering the rock formation where he found the vials, but coming "inland a little bit further" and flooding the parking area (Tr. 73, 79-80).

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[1] After the verdicts, Judge Korman appointed present counsel pursuant to the Criminal Justice Act. The Court of Appeals continued counsel's appointment on appeal.

Investigators found some vials in the water in front of the complex after this discovery.

Some four months earlier, a number of other vials had been found by school children on a trip to a Staten Island beach. Fortunately, though some vials had "cracked" (most had, however, remained sealed with stoppers in plastic containers or ziplock bags), no one was injured. The schoolgirl-witnesses testified that they knew that they should not touch the vials, and that they had not done so.

The vials were traced to Plaza Health Laboratories, Inc., of which respondent Villegas was a 50% owner and in the operation of which he did non-technical marketing work. Villegas reportedly stated to investigators that, in around June 1988, after the lab's refrigerator was filled with vials, he had "filled two plastic containers and several plastic zip-lock bags with blood vials and drove them over to where he lived in New Jersey"; then, "[w]hen he got there to the parking lot, he saw the rocks [and] placed two containers and the zip-lock bags into the rocks".[2] The vials found in September matched this description.

A professor of coastal engineering testified for the government that Staten Island was a "likely spot for washup" of

---

[2] (GX8 & Tr.132-33). Villegas stated that he had disposed of vials on two other occasions as well, but not near the river. Once, he had put "junk" in the storage room at the condominium complex, including "a small amount of blood vials and needles in a plastic bag and I think Corvac tubes" (Tr. 136). Another time he had put some vials in the garbage can at the Binghamton health club where he used to run a pro shop (Tr. 137). He reportedly intended to put the vials in his incinerator on this occasion, but was attracted to the bulkhead instead.

items drifting in the water from the New Jersey area where Villegas lived. He also stated that water would not often rise over the bulkhead at that location. Rather, it would take a "storm surge", which was a "rare occurrence", the prime time for which is in September as a result of hurricanes or tropical storms (Tr. 329-30).

B. Knowing Endangerment: One Wayne Pizzuti, the Director of immunologic laboratory services at the New Jersey Department of Health, testified that his lab had tested blood in some of the vials retrieved at the condominium in September 1988, and stated that five had been positive for hepatitis B (Tr.346-47). Pizzuti testified that the hepatitis B virus could cause liver damage and that the infection can be fatal (though one infected can also recover). He also said that the virus is contagious, and that, were someone to step on a blood vial containing contaminated blood, the virus could enter the system (Tr. 339). When asked whether it would be "possible for someone who is swimming in water which contains blood that was infected with hepatitis B to contract hepatitis B", this expert answered that he "imagine[d]" so. When pressed by the trial judge to explain what he meant by "imagine", Pizzuti answered that "[i]f circumstances were right, it could be transmitted that way" -- which meant (upon further inquiry) that the person who happened to be swimming next to a vial containing infected blood would have to have "breaks in the

skin or breaks in the mucus membranes so that . . . exposure at those points then you could contract it that way" (Tr. 339-40).

Though purported to be an expert, Pizzuti did not have a ready answer to the question as to what effect the elements -- water, air and sun -- would have on the virus (Tr. 351). Nor did he know even "in general terms" what the effect would be if a contaminated vial were to fall into the water and break (Tr. 51-52). Pizzuti generalized that, if you had a "high enough concentration of the virus", then it could still be infectious. He said, however, that there had not been a high concentration in the vials he had examined (Tr. 355). Pressed by the trial judge, Pizzuti expressed his belief that it would not be likely to contract the disease from swimming (Tr. 356).

Another expert, one Dr. Prince, the senior investigator and the head of the biology lab at New York Blood Center who had also written 200 papers about hepatitis B (Tr. 360), testified that hepatitis B could be "self-limited" and result in recovery, but could also be "quite severe", and on rare occasions could result in death. Prince confirmed Pizzuti's testimony that permeation of skin by the virus would cause infection (Tr. 362). Prince further testified that an extremely small amount of blood on a piece of glass could cause contamination (Tr. 362).

Though Pizzuti had not known the effect of water on the virus, Prince testified that the cool river water would tend to preserve the virus, which is "heat stable" (Tr. 362-63). In fact, Prince's lab had tested five vials that had been retrieved

from the Staten Island beach area a year after the event (Tr. 367). Though stored in a non-refrigerated, heated area (presumably by investigators who did not know the virus' properties), one vial still had tested positive for hepatitis B. (Tr. 367). Out of the jury's presence, Judge Korman inquired on the issue at the core of the "knowing endangerment" charges:

> THE COURT: . . . Doctor, if three or four or five vials like -- of the kinds we have been talking about were dropped in the Hudson River, would you say that that would place any person in imminent danger of death or serious bodily injury?

The witness responded (Tr. 371):

> THE WITNESS: If those vials were to land on the shore and someone were to step on them and puncture their skin, they would be in danger of infection, hepatitis B, yes. Those vials that were infected, of course. They all were not.

The witness concluded, however: "The risk of this happening is low but it is a risk."

For unknown reasons, Villegas' trial counsel, though thus made aware of the expert's highly favorable answer, declined to ask Dr. Prince the same question in the jury's presence (Tr. 372) -- a factor that prompted District Judge Korman to observe, during post-verdict Rule 29 argument, that he believed that trial counsel had been "less then competent in his representation here" (9/16/91 Tr. 32-33, 96-99).[3]

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[3] The district court entertained a motion pursuant to Rule 29(d) for a new trial based on ineffective assistance of trial counsel, contingent on his denying the Rule 29 motion (see 6/16/91 Tr. 96). In granting Mr. Villegas' Rule 29 motion in part, the court did not rule on this contingent Rule 29(d) motion. It did, however, state that, if it was wrong in holding

(continued...)

The remaining proof pertained to whether Villegas "knew" of the "danger": A niece of Villegas who had worked at the lab testified that Villegas had worked at other labs previously (Tr. 247). At Plaza, she had seen him almost every day bringing blood in vials in ziplock bags, which he would put in the refrigerator or number them with Plaza's lab number (Tr. 247-48). She stated, however, that the person who would write a number on the vials or on the request form does not know results of the tests (Tr. 257).

An individual licensed as both a supervisor and technician by the New York City Department of Health (Tr. 260-62) testified that there was an assigned area for hepatitis testing, and the technicians wore a gown and gloves for protection (Tr. 264). About 35-50% of blood samples at Plaza were tested for hepatitis. After a hepatitis test, vials were placed in a rack in the lab; at the end of the day, the rack went into the refrigerator (Tr. 270). Though Villegas would "come and go" in the lab for a few minutes "here and there", the supervisor confirmed that Villegas was "not a technician" (Tr. 271-74).

A part-time pathologist testified that one Dennis Chandra and respondent Villegas were in charge of the lab (Tr. 278-80) and identified a Policy and Procedure Manual kept in the Plaza offices (GX-11, Tr. 283). The witness identified Chandra, not respondent, as the chief contact person for Plaza. Chandra

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[3](...continued)
the evidence insufficient on the "knowing endangerment" counts, then a new trial would have to be held anyway because the instructions had been erroneous on the knowing endangerment issue (Memorandum and Order at 17 n.5, Pet. App. 49a-50a).

apparently had a Ph.D. in chemistry (Tr. 285-86). The witness did not know what Villegas' profession or function was, except that Villegas never carried vials (Tr. 287). After the discovery of the vials, Villegas purportedly told this witness that "it's stupid of me to have done that" (Tr. 285).

Although Villegas' trial counsel did not sum up to the jury using Villegas' statement, that statement included an expression of this defendant's state of mind that negated an inference that he "knew" he had endangered others with his conduct. Explaining why he had disposed of the vials, Villegas said that his "refrigerator was getting full" and went on to explain: "And besides, the thing is, it's in the containers and would not harm nobody, I guess" (GX-8, Tr. 137).

C. The Jury Charge: After extensive consideration, District Judge Korman declined to instruct the jury in accordance with the government's position that a human being is a point source.[4] He

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[4] EPA environmental engineer Durack had testified as a government witness that it was his job to "determine what the point sources are and to make sure that they have permits to control the discharge of pollutants." Durack went on to describe a point source as any of several types: "There are discharge pipes. There are vessels which could be a truck, could be a ship. Or it could be a person or persons" (Tr. 184). Though Durack posited that a "point source" could be a human being, he conceded that his office had never granted a permit for a human being to discharge as point source (192): "Not for the person to put the pollutants in himself, no," he admitted.

District Judge Korman, after struggling with the concept of "point source", ultimately told the jury to disregard Durack's testimony about the meaning of a "point source", and instead charged the jury (see Pet. App. 65a):

(continued...)

decided to tell the jury instead that it could "assume" that "it was a point source", allowing the defendant to reserve his objection on the question of law which in any event, as the district court properly understood, could not be waived because "[i]f it is not a crime, it is not a crime" (Tr. 293; 292-99). In accordance with this plan, the trial court instructed the jury that "[r]emoving pollutants from a container, and a vehicle is a container, parked next to a navigable body of water constitutes a discharge from a point source" (Tr. 470).

D. The Rule 29 Decision: Though Judge Korman was "terribly troubled" by the government's broad argument that a human being is a "point source" (9/16/91 Tr. 90), he sustained Villegas' convictions by determining that a human being is a point source

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[4](...continued)

> Congress chose to distinguish between "point sources" and "non-point sources" with the specific purpose of excluding various kinds of pollution runoff, that is, runoff produced principally by rainfall that cannot be traced to one polluter. Congress did not intend to exempt from regulation any activity that emits pollution from an identifiable point. Congress did not intend by the term "point source" to distinguish between a person who drives a truck to the edge of the Hudson River and dumps blood vials, clearly a point source, and a person who gets out of a truck, takes the vials from the truck, walks to the river's edge and dumps them from his hand. Removing pollutants from a container, and a vehicle is a container, parked next to a navigable body of water and physically throwing the the [sic] pollutant into the water constitutes a discharge from a point source.
>
> In this respect I ask to you [sic] forget and disregard the testimony of Patrick Durack on this issue.

within the meaning of the Clean Water Act. Acknowledging that the image of a human being is not "conjured up" by the definition of "point source" -- defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged", 33 U.S.C. § 1362(14) -- Judge Korman nonetheless was of the view that, where the source of a pollutant is "no mystery" but is rather identified (Tr. 294), then that source -- even if it is a human being -- should be considered a "point source" of pollutants, and that the Act applies to that "discharge". Judge Korman believed that this result was not inconsistent with the statute, since the definition of "point source" does not "exclude" a human being from its ambit. Further assuming -- but citing no authority to support the assumption -- that Congress must have meant to include all pollution other than "nonpoint source" pollution within the criminal prohibitions of the Clean Water Act (Pet. App. 39a),[5] Judge Korman determined that it made

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[5] Judge Korman's conclusions in this regard, like dissenting Circuit Judge Oakes' conclusions, were posited as the statute's purpose without citation to any legislative history or other authority that so suggests. Nor are we aware of any legislative suggestion that Congress' purpose "in specifically proscribing pollution from a 'point source' was to ensure that naturally-induced, random run-off of pollutants would not result in criminal or civil liability under the Clean Water Act", but that all other pollution was within the Act, as Judge Korman construed it (Pet. App. 39a). Congress' purpose was not to exempt some forms of pollution; it was to regulate some forms of pollution. Had Congress meant to reach everything except identified exemptions, it could have said so.

Indeed, Congress never defined "non-point source" pollution in the statute. Its statement that run-off is not "point source" pollution merely shows an intent not to regulate that type of pollution (because it is near impossible to do so), (continued...)

no sense to hold that "'point source' does not encompass the deliberate discharge of pollutants produced in the course of a waste-generating activity, merely because a person directly deposits those pollutants into the water" (Pet. App. 39a-40a). Thus, said the district court, a human being should be deemed a "point source" even if that person is only an "intermittent polluter", since the statute defines a discharge to include "any addition of a pollutant to navigable waters from any point source" (Pet. App. 42a, citing 33 U.S.C. § 1362(12)) (emphasis added by Judge Korman).

In the very next breath, however, Judge Korman somewhat contradictorily agreed that Congress did not intend the Clean Water Act to apply to "any addition of a pollutant . . . from a [human being]" (Pet. App. 42a) (emphasis added). Trying to rationalize how the statute could be applied in this case and yet deemed inapplicable when a person flings a candy wrapper or urinates into the waters, Judge Korman went on to re-craft the rule, not found in the Act, by which the term "point source" should be read

> to include any discrete and identifiable conduit -- including a human being -- designated to collect or discharge pollutants produced in the course of a waste-generating activity.

(Pet. App. 42a). Judge Korman did not, however, explain what is meant by "designated" to collect or discharge pollutants; nor did

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[5](...continued)
but it does not show an intent to include within its definition of "discrete, discernible conveyance" something like a human being that just does not fit within the Act's terms.

he point to any place in the statute where that limitation, or the limitation "produced in the course of a waste-generating activity", might have come from. Nor, indeed, did the court explain why that definition would in fact exclude a human being who urinates in the water, given that a human body involves many "waste-generating activities" and produces pollutants.

The district court went on to hold that, as to the counts dealing with the September 1988 discovery of the vials in the bulkhead, there was also "an independent basis" to hold that Villegas' conduct was within the Act: Even if a human being were not a "point source", the rocks forming the bulkhead at the condominium complex "comes within the definition of that phrase" (Pet. App. 43a). Alternatively, the district court continued, "even if the bulkhead does not constitute a 'point source,' the very containers holding the blood vials" can be deemed a "point source" because they are also "containers" (id.). Thus, although the jury was never charged on any of these shifting and novel theories of criminal liability (a factor that rendered the convictions unsustainable for reasons stated in the footnote below)[6] -- and despite the fact that this "anything-can-be-a-

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[6] At oral argument, District Judge Korman indicated that the theory he was considering was based on a new way of looking at the statute and that the "appropriate question" was "[w]hether pollutants were generated during the course of a continuous waste generating activity and then deliberately dumped from a discrete and identifiable point" (9/16/91 Tr. 7). The court concluded that, because under that theory, the defendant was "generating" pollutants" and deliberately "dump[ed] them from a discrete and identifiable point", the defendant could be liable under the Act.

(continued...)

conveyance"-type of rationale suggests even more strongly that the formulation reads out of the statute entirely the concept of "discernible, confined and discrete conveyance" that is an element of the definition of "point source" -- the district court held that these grounds, too, warranted sustaining the charges.[7]

E. The Court of Appeals' Decision: The Court of Appeals' majority first held that the district court's "post-verdict definitional efforts" to arrive at an alternate theory upon which to sustain the convictions ran afoul of this Court's decision in

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[6](...continued)
Judge Korman acknowledged that this theory was "not precisely what [he] charged the jury"; however, he believed that this shift was not "significant" because "the facts are not really in dispute here" (9/16/91 Tr. 8). With all respect to Judge Korman, his belief in this instance is just not in accord with the principle that an uncharged theory cannot be used to salvage a criminal conviction. Chiarella v. United States, 445 U.S. 222, 236-37 (1980); Rewis v. United States, 401 U.S. 808, 814 (1971); Dunn v. United States, 442 U.S. 100, 106-07 (1979)). As these cases show, when legal theories are not submitted to the jury, it is inappropriate to later inject them as a basis to sustain a conviction.

[7] The district court then went on to grant the Rule 29 motion as to the "knowing endangerment" counts, counts One and Three. The court held that to satisfy that provision, a discharge must "actually place another person in imminent danger of death or serious bodily injury", not merely create a "potential" consequence (Pet. App. 49a). The district court also held that the defendant must know that such a "high probability" of danger existed at the time pollutants are discharged into the waters (id.), and concluded that the evidence did not sustain a finding that respondent was so aware (Pet. App. 52a). The court further held that its previous instruction to the jury -- that some lesser degree of probability would suffice -- was wrong. As a consequence, the district court concluded that, even if the appellate court were to disagree that the evidence was insufficient to show "knowing endangerment", a new trial would be required at which proper jury instructions are provided (Pet. App. at 49a-50a n.5).

Chiarella v. United States, 445 U.S. 222, 236 (1980) (court may not affirm conviction on basis of theory not presented to jury). Since, though the government had argued at trial that a human being was a point source, the district court, rejecting that suggestion at the time, took the issue from the jury and charged that "[r]emoving pollutants from a . . . vehicle . . . parked next to a navigable body of water and physically throwing the pollutant into the water constitutes a discharge from a point source" (Pet. App. 65a), the Court of Appeals held that there would be a "serious problem" in upholding the conviction on the basis that a human being is a point source" (Pet. App. 7a).

The more significant problem, however, said the majority, was that, as the district court's analytical struggle only highlighted, "the statute was never designed to address the random, individual polluter" such as respondent.

The majority first looked to the language and structure of the Clean Water Act. Although the statute defines "point source" in nonexclusive terms (as quoted in the footnote below),[8] the terms used in the statute neither include a "human being", nor "conjure up" the image of a human being as the type of

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[8] 33 U.S.C. § 1362(14) defines "point source" as follows:

> The term "point source" means any discernible, confined and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

"discernible . . . conveyance" that Congress meant to target in enacting the Clean Water Act. Moreover, as the majority aptly noted, "[h]ad Congress intended to punish a human being who polluted navigational waters, it could readily have said: 'any person who places pollutants in navigable waters without a permit is guilty of a crime'" (Pet. App. 8a).

More than simply being a case of an omission of the term "human being" from the definitional "point source" section of the statute, the majority agreed that the Clean Water Act as a whole uses the term "point source" in a way that refers to fixed industrial plants, and simply does not make sense when applied to an individual polluter (or his or her personal automobile). The majority cited as examples 33 U.S.C. § 1311, which refers to the "owner or operator" of a "point source"; § 1311(e), which requires that effluent limitations "be applied to all point sources of discharge"; § 1311(g)(2), which allows an "owner or operator of a point source" to apply to EPA for modification of its limitations requirements; § 1342(f), which refers to classes, categories, types and sizes of point sources; and a host of other references, all of which make it clear that individual pollution was not what the statute was meant to cover. "As the statute stands today," the majority concluded, "the term 'point source' is comprehensible only if it is held to the context of industrial and municipal discharges" (Pet. App. 9a).

The majority next noted that, though the purpose of the Clean Water Act is broad and admirable, the mere declaration of a

broad purpose could not substitute for "comprehensible" meaning. The majority quoted the words of Senator Robert Dole, whose words in discussing the 1972 amendments to the Act suggested, as did respondent below, that a human polluter is more akin to "non-point source pollution", which is not within the meaning of "discharge" and thus not covered by the Act, than to "point source" pollution, which is covered by the Act's terms, because the Act was designed to apply to sources of pollution that "confine [their] polluting discharge to [a] specific outlet". Senator Dole's quoted words are:

> Most of the problems of agricultural pollution deal with non-point sources. Very simply, a non-point source of pollution is one that does not confine its polluting discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit; thus a feedlot would be considered to be a non-point source as would pesticides and fertilizers.

(S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3760, quoted at Pet. App. 11a (emphasis added)). The majority found no suggestion "either in the act itself or in the history of its passage" that Congress intended to reach pollution caused by individuals who "do[] not confine [their] polluting discharge to one fairly specific outlet".

Finally, looking to case law under the Act, the majority found that, unlike this case, there was a clear "point source" -- one that fit comfortably within the terms of the definitional section of the Act, and within an industry targeted by Act as well -- in the prior criminal cases decided under 33 U.S.C. § 1319(c) (see cases cited at Pet. App. 13a). Noting that, while

there may have been "greater flexibility of interpretation" in civil cases, see Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) ("point source" includes bulldozing equipment discharging dredged materials onto wetland), there is no room for ambiguity in criminal cases because of the rule of lenity, the majority also determined that none of the civil cases -- and not even the broad dicta in one of the earliest civil cases, United States v. Earth Sciences, Inc., 599 F.3d 368, 373 (10th Cir. 1979), to the effect that the Act embraces "the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters" in order to effectuate the purposes of the act -- provided a sufficient basis to make the "leap" to including a human being in the statutory language since such a construction would "do[] violence to the language and structure of the CWA" (Pet. App. 14a).

So, too, the majority noted, even in the regulations of the EPA itself -- the agency whose interpretations are entitled to "deference" -- there was no support for the broad position that an individual is a "point source" of pollution. Rather, the EPA regulation (40 C.F.R. § 122.2) provides that "discharge" of a pollutant includes "discharges through pipes, sewers or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works", and does not include "an addition of pollutants by any 'indirect discharger'" (Pet. App. 15a). Adopting the government's theory, the majority concluded, "would effectively read the 'point source' element of the crime

out of the statute" (Pet. App. 15a). Because the meaning of "point source" was thus at least ambiguous, the rule of lenity prohibited a conviction on these facts.[9]

Judge Oakes, in dissent, stated that he did not agree that a person "can never be a point source". Starting with the proposition that, though the "classic" point source is "something like a pipe", there were other "discernible, confined and discrete conveyances" that have also been deemed point sources by various courts (Pet. App. 19a-21a), Judge Oakes determined "in short" that the term "point source" "has been broadly construed" to cover "a wide range of polluting techniques" and that it should be broadly construed. Apparently recognizing that the Act was not completely limitless, however, Judge Oakes fashioned his own formulation for exclusions from the Act's coverage -- which carried no citation to any provision of the Clean Water Act -- that "polluting techniques" were within the Act

> so long as the pollutants involved are not just humanmade, but reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort.

(Pet. App. 21a). Judge Oakes then determined, with a quotation to the early Earth Sciences case, supra, 599 F.2d 368 (10th Cir.

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[9] The majority determined that, because it was dismissing the charges for a failure to prove a "point source", the same defect existed vis-a-vis the "knowing endangerment" counts. The majority thus did not address the government's claim that the district court had applied the wrong standard of "knowing endangerment" or that the evidence had been sufficient to prove the enhanced offense.

1979)[10] (certiorari was apparently never sought in Earth Sciences, and the decision has been criticized),[11] that a "broad reading" of "point source" along the lines he had just formulated was "essential to fulfill the mandate of the Clean Water Act". (Pet. App. 22a, quoting 599 F.2d at 373).

Judge Oakes recognized that the term "point source" must also be read to "set[] significant definitional limits on the reach of the Clean Water Act" (Pet. App. 23a). His reason for this conclusion was based on what he termed the "assumption" of most cases and commentators that "all water pollution is either point source pollution or nonpoint source pollution" (Pet. App. 23a n.2), and the view stemming from that assumption and from the Act's broad goals that the Act covers all "point source" pollution and "exempts" only "nonpoint source discharges" (Pet. App. 23a). Though the Act does not define "nonpoint source", Judge Oakes offered his suggestion of what that term means, though again this determination carried no citation to any provision of the Act. Deviating from the description given by Senator Dole that "a non-point source of pollution is one that does not confine its polluting discharge to one fairly specific

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[10] The court in Earth Sciences had expressed the view that "it contravenes the intent of the [Act] . . . to exempt from regulation any activity that emits pollution from an identifiable point".

[11] Earth Sciences was criticized by the D.C. Court of Appeals in National Wildlife Fed'n v. Gorsuch, 224 U.S. App. D.C. 41, 693 F.2d 156 (D.C. Cir. 1982), in which the EPA had taken contradictory positions.

outlet such as a sewer pipe", which the majority had quoted (Pet. App. 11a), Judge Oakes concluded that

> Nonpoint source pollution is, generally, runoff: salt from roads, agricultural chemicals from farmlands, oil from parking lots, and other substances washed by rain, in diffuse patterns, over the land and into navigable waters.

(Pet. App. 23a-24a).

Apparently finding no provision in the Act itself that supported the view that only the conditions identified by Judge Oakes as "non-point source" pollution were "exempted" from the Act, Judge Oakes pointed instead to a publication the EPA: EPA Office of Water, Officer of Water Regulations and Standards, Nonpoint Source Guidance 3 (1987) (cited at Pet. App. 24a n.3). That document, however, defines "nonpoint source pollution" only with the circular definition that it is pollution "caused by diffuse sources that are not regulated as point sources".[12] Judge Oakes nonetheless continued with his analysis by suggesting that the rationale for treating point and nonpoint sources differently was that nonpoint sources are "more difficult to control" (Pet. App. 25a). Because "point sources" are known, and

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[12] The EPA publication goes on to state that the concept

> normally is associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. Such pollution results in the human-made or human-induced alteration of the chemical, physical, biological and radiological integrity of water. In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

thus easier to control, the dissenter concluded that Congress must have meant to control all identifiable sources of pollution as "point sources".

Judge Oakes acknowledged that respondent's activities "were not prototypical point source discharges" since respondent could have disposed of the pollutants on land and "so did not need a permit or a pipe" (Pet. App. 26a). However, the dissent concluded, because the discharge "was [supposedly] directly into the water, and came from an identifiable point", this must be a "point source" discharge within the Act.

Judge Oakes also opined that it was not necessary "to determine whether it was Villegas himself who was the point source, or whether it was his car, the vials, or the bulkhead". This was because, to Judge Oakes, "the entire stream of Mr. Villegas' activity functioned as a 'discrete conveyance' or point source" (Pet. App. 26a). Just because Congress did not list this method of disposing of waste in the statute, Judge Oakes said, that should not mean that the Act should be deemed ambiguous as to its intent to cover respondent's conduct (id.) Were he to read the Act any other way, Judge Oakes said, it would "encourage corporations perfectly capable of abiding by the Clean Water Act's requirements to ask their employees to stand between the company trucks and the sea, thereby transforming point source pollution (dumping from trucks) into nonpoint source pollution" (Pet. App. 27a).

After expressing his views on the matter, Judge Oakes turned to the majority's counterarguments. Though he "granted" that it "sounds odd" to read the term "point source" to include a "person" when it would lead to a statutory statement prohibiting "any addition of any pollutant to navigable waters from a person by a person", that "oddity" could be cured if one did not "assum[e] that the term 'person' means the same thing in both parts of the sentence, and that in both cases it means what it means in everyday language". Judge Oakes' solution was to use the "first term 'person'" to mean "'a person acting as a point source'" and the second term "person" to mean a "responsible party" (Pet. App. 28a-29a).

Judge Oakes went further -- opining that a person "can be both point and nonpoint sources of pollution" (Pet. App. 28a n.6 (emphasis added)), depending on whether he or she "deposit[s] waste directly into water", in which case the person is a "point source", or "spread[s] fertilizer on the ground or deposit[s] oil in a driveway", in which case the person is a non-point source of pollution.

Judge Oakes admitted that he was "given pause . . . by the nature of the criminal sanctions" under the Act. Though given his broad definition, the Act could include "intentionally throwing a candy wrapper into the ocean" -- which Judge Oakes was though Congress had probably not intended the Act to cover (Pet. App. 29a-30a) -- Judge Oakes fashioned his own formulation of the limitation by "read[ing] the statute as ambiguous as it pertains

to individual litterers, as opposed to disposers of industrial and municipal waste" (Pet. App. 30a).

Judge Oakes concluded that, since there was no "essential" dispute as to facts, there should be no difficulty in sustaining the verdict even though the jury did not expressly find guilt based on Judge Oakes' formulation. Nor, said Judge Oakes, did the rule of lenity require reversal, because, even though some human pollution was to be excluded from the Act's coverage, the statute was, to him, unambiguous "with respect to an individual physically disposing of medical wastes, in quantity, directly into navigable waters, by means of a controllable, discrete conveyance and court of action" (Pet. App. 31a).

ARGUMENT

THE WRIT SHOULD NOT BE GRANTED

The government seeks a writ of certiorari because of the supposed "mistake" by the Court of Appeals in deeming the Act's "breadth" an "ambiguity. Accusing the majority of "creat[ing] a non-textual requirement" that is "incapable of principled administration", the government urges review by this Court on the ground that the Court of Appeals' reading of the Act "conflicts with the Act's plain language".

Although the government seizes on the statutory word "any" and argues that, as District Judge Korman and dissenting Judge Oakes concluded, the use of the term signifies Congress' intent

to cover the conduct at issue here,[13] the term "any" does not stand alone: it precedes the phrase "discharge of any pollutant". While seemingly a broad and encompassing phrase, the term "discharge" is limited by the statutory definition: "any addition of any pollutant to navigable waters from any point source". 33 U.S.C. § 1362(12). Like it or not, the term "point source" limits the reach of the Clean Water Act. The Court of Appeals properly interpreted the statute as having not been intended to cover the random individual pollution caused by Geronimo Villegas. Indeed, it is the government, as well as District Judge Korman and dissenting Judge Oakes, who urge a "non-textual requirement", simply to shoehorn an individual's pollution into the statute's terms: they would subject an individual to criminal liability if the source of the pollution was "industrial waste", but not otherwise. Such a limitation of the word "pollutant" does not exist in the statute. The Court of Appeals correctly determined the issue before the Court.

The government claims, however, that the definition of "point source" is not "susceptible to [the supposedly] narrow interpretation" given it by the Second Circuit majority, and further claims that, whether it includes human beings or not, the term "clear[ly]" includes respondent's automobile, supposedly used to transport blood to the bank of the Hudson River (Petition

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[13] As Judge Oakes and District Judge Korman noted, the phrase "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source". 33 U.S.C. § 1362(12).

9-10) since it is a "conveyance". (See also Petition at 11 (issue whether human "conveyance" is within Act is "not pertinent to the validity of respondent's conviction" since jury was charged that "vehicle was the statutory 'conveyance'")).

Notwithstanding the government's argument, even if a personal automobile could be deemed a "point source" without doing violence to the statutory language, the conduct would still not be within the Clean Water Act because respondent took the vials out of the car before they came anywhere near the navigable waters. It was respondent, not the vehicle, who "added" the pollutant to the bulkhead. There was thus no discharge "from" any point source, as the statute requires.

The term "discharge", again, is thus defined as "any addition of any pollutant to navigable waters from any point source". 33 U.S.C. § 1362(12) (emphasis added). Just as the government claims the word "any" cannot be deemed surplusage, nor is the word "from" mere surplusage. Indeed, it was the basis of a holding by the United States Court of Appeals for the District of Columbia Circuit -- not cited by the government in its petition[14] -- that the EPA did not have a duty to require dam

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[14] The government argues that the Second Circuit "cited no statutory language" calling for an "exception" to liability for discharges by one's personal vehicle when there is the "intervention of a human being between that conveyance and the water" (Petition at 11). The government further suggests in a footnote (Petition at 11 n.3) that, though the Second Circuit's analysis "appears to be based on th[e] assumption" that the Act requires that the "last chain in the link of conveyances itself be a 'point source'", "nothing in the act requires it". Id.

(continued...)

operators to apply for certain pollutant discharge permits under the Act. National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982). The issue in the case was not whether the dams contributed to pollution: they did. Further, there was no issue that certain "conveyances" in dams were point sources for some purposes: the spillways through which water flowed from reservoirs through the dams had been determined to be "point sources" by the EPA in the past. 693 F.2d at 165 & n.22. Instead, the sole issue was whether the water quality changes that resulted from release of water through the dams constituted the "discharge of a pollutant" as that term is defined under 33 U.S.C. § 1362(12) such as to require the EPA to regulate dams.

According deference to the EPA's position on the matter, the Court of Appeals held that the EPA had no duty to regulate dams. The EPA's position was that the "addition [of a pollutant] from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world" -- that the "point or nonpoint character of pollution is established when the pollutant first enters navigable water . . . ." 693 F.2d at 175. Since in Gorsuch the polluted water passed through the dam from one body of navigable water (the reservoir) to the other

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[14](...continued)
As discussed in the text above, however, the statute pertains to additions of pollutants "from" point sources, and the EPA believes that the Act does require that the "last chain in the link of conveyances itself [must] be a point source". The language of the Act would be meaningless if the Act were read as the government wishes.

(the downstream water), the pollutant had not been added "from" the dam, and it was thus not a "point source".

For the same reasons as in Gorsuch -- under the EPA's reasonable and judicially approved position -- there was no discharge "from" Geronimo Villegas' vehicle. Even if one's personal automobile could otherwise be deemed a "point source", there was thus no criminal violation of the statute here.

In positing that the automobile is a "point source" and the conduct a "discharge" within the meaning of the Clean Water Act, the government -- though acknowledging that "the language actually enacted by Congress" controls the interpretation of the statute (Petition at 12, citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 & n.13 (1985) -- offers a conclusion drawn from only one word of the statute: "conveyance". That word, however, is not only limited by words that the government and, indeed, many prior court decisions have not sufficiently analyzed, preferring instead to speak of the broad goals of the statute, but it is given its context and content from the words used by Congress through the statute, all of which must be read in conjunction and none of which should be rendered superfluous by a court's construction of a portion of the statute. See United States v. Campos-Serrano, 404 U.S. 293, 301 & n.14 (1971), quoting Market Co. v. Hoffman, 101 U.S. 112, 115-116 (1879) ("[A] statute ought, upon the whole, to be so construed that, if it can

be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant").[15]

The Court of Appeals' rightly concluded, through a sound analysis of the statute itself, that the language and structure

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[15] In Campos-Serrano, this Court held that possession of a counterfeit alien registration receipt card was not an act punishable under 18 U.S.C. § 1546, which criminally punishes one who "knowingly . . . possesses" any "immigrant or nonimmigrant visa, permit, or other document required for entry into the United States". While the INS at the time permitted an alien registration card to be used for an alien's re-entry into the United States, it was not a "required" document. This Court, invoking the rule of lenity, said (citations omitted):

> It has long been settled that "penal statutes are to be construed strictly," . . . and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it," . . . "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." . . . In § 1546, Congress did speak in "clear and definite" language. But, taken literally and given its plain and ordinary meaning, that language does not impose a criminal penalty for possession of a counterfeited alien registration receipt card. Alien registration receipt cards may be used for re-entry by certain persons into the United States. They are not required for entry.
>
> * * *
>
> The language of § 1546 denotes a very special class of "entry" documents -- documents whose primary raison d'etre is the facilitation of entry into the country. The phrase, "required for entry into the United States," is descriptive of the nature of the documents; it is not simply an open-ended reference to future administrative regulations.

The Court's words apply equally in this case. "Point source" is "descriptive" of an origin of pollutants. Dissenting Judge Oakes' suggestion that a human being can be a point source if the pollutants he carries consist of "industrial and municipal waste" instead of "individual litter[]" merely substitutes Judge Oakes' predilection of what the statute should have covered for what it does cover.

of the Act as a whole demonstrate that individual pollution was not what the Clean Water Act was meant to cover. It meant to regulate some pollution, not to regulate all pollution with only some exceptions, as district judge Korman, dissenting Judge Oakes, and the government contend.

Indeed, in enacting the Clean Water Act, Congress specifically recognized that it is the "primary responsibilit[y]" of the States to prevent, reduce, and eliminate water pollution, 33 U.S.C. § 1251(b).[16] Accord, American Paper Institute v. United States Environmental Protection Agency, 996 F.2d 346, 302

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[16] The respondent caused the pollution from his home in New Jersey. New Jersey, in fact, commenced a prosecution against respondent and Plaza Health Laboratories, but dismissed the criminal case. It was only after the dismissal that the federal prosecutors took up the torch, so to speak, and tried to cram this case into the gaps of the Clean Water Act because of their sense that there should be some criminal punishment. Of course, the prosecutors, like the judges of the federal courts, are not legislators. Their sense of outrage is no substitute for a statute that reaches the conduct at issue.

Nor should the federal authorities worry that the State cannot protect the waters. New Jersey has a comprehensive code that regulates and even criminalizes pollution. See N.J. Stat. 58:10A-6 (entitled "Regulation of discharges of pollutants; permits; exceptions; right of entry; regulation by local agency; inspections; priority pollutant analysis; public access to records"). Section "a" of the statute as it stands today makes it "unlawful for any person to discharge any pollutant, except in conformity with a valid New Jersey Pollutant Discharge Elimination System permit that has been issued by the commissioner pursuant to this act or a valid National Pollutant Discharge Elimination System permit issued by the administrator pursuant to the Federal Act, as the case may be." Whether or not this provision would have criminalized respondent's conduct at the time in question, the State is perfectly able to enact legislation and enforce anti-pollution laws. If the statutes were not sufficient to cover respondent's conduct at the time, the remedy is not for the courts to legislate, but to invoke a legislative cure.

U.S. App. D.C. 80 (D.C. Cir. 1993) (discussing "Congress' intent to cast the states in the featured role" under the Clean Water Act). Congress' purpose was to place some federal controls on pollution of the nation's waters: those controls included regulation of industrial sources of discharges of pollution, and were accomplished by authorizing the Administrator of the Environmental Protection Agency (EPA) to establish limitations (called "effluent limitations"[17]) on "permissible" levels of discharge of toxic and other pollutants by "sources" to be identified by the Administrator (with the help of the States) as "point sources" and categorized.

Congress did not totally prohibit the "discharge" of "pollutants" -- not even "toxic pollutants"[18] that can cause great harm to the life and health of the citizenry. Rather, it expressed as a policy goal the elimination of pollution in the

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[17] "Effluent limitation" means "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . , including schedules of compliance." 33 U.S.C. § 1362(11).

[18] The term "toxic pollutant" means (33 U.S.C. § 1362(13))

> those pollutants . . . including disease-causing agents which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions . . . or physical deformations in such organisms or their offspring.

future,[19] provided monies for studies and regulation, and required "point sources" to obtain permits in order to lawfully discharge pollutants into the waters. The discharges would have to comply with whatever limitations were set by the State and federal governments. There were also reporting and record-keeping requirements established by the Act.

In framing such a necessary and commendable (though as yet unachieved) policy, the sense of Congress thus incorporated a recognition that, while all pollution should be eliminated, every instance of pollution will not necessarily constitute a violation of the Clean Water Act. Further, unlicensed instances of pollution are wrongful only if "discharges" of "pollutants" occur "from" a "point source" into the "navigable waters".

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[19] The 1972 Amendments established 1985 as a desired date for the total elimination of discharges of pollution, and set as a policy goal that toxic pollutants "in toxic amounts" should be prohibited. 33 U.S.C. § 1251. The goal of elimination has obviously not been met. Nor has toxic pollution been significantly controlled. As reported in the 1989 Environmental Reporter, 19 Env. Rptr. 2573 (April 7, 1989), the National Toxic Campaign was complaining that over 2000 pounds of toxic substances were being discharged into the Boston Harbor each day, and that most of the 1500 companies involved in the discharges were in compliance with permits and with State regulations.

The definition of "point source" in 33 U.S.C. § 1362(14)[20] cannot include everything that could arguably "convey" a pollutant. If Congress had meant that, it no doubt would have -- and easily could have -- said so clearly. Instead of saying: "Any person who places pollutants in navigable waters without a permit is guilty of a crime", what it did say is completely inconsistent with applying the statute to a human being who pollutes and shows an intent, as the Second Circuit majority properly accepted, to regulate industries and industrial waste from fixed and identified plants. As shown in the footnote below[21] and discussed by the Second Circuit majority (at

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[20] Again, the definition is:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.

[21] For example, 33 U.S.C. § 1342(f), entitled "Point source categories", requires the EPA Administrator to "establish[] categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section", and allows the Administrator to "distinguish among classes, types, and sizes within any category of point sources." One wonders how the Administrator would "distinguish among classes, types, and sizes" of human beings or personal vehicles.

Likewise, 33 U.S.C. § 1316(d) refers to "any point source the construction of which is commenced after October 18, 1972". This language also is hardly explainable in terms of an individual's pollution. Finally, by way of example, 33 U.S.C. § 1318 provides that the EPA Administrator "shall require the owner

(continued...)

Petition 8a-9a), "the term point source is used throughout the statute, but invariably in sentences referencing industrial or municipal discharges" and plants".

The legislative history is consistent: Not only does the Senate Report discuss how the permit system "establishes a direct link between the federal government and each industrial source [emphasis added] of discharges into the navigable waters" (1972 U.S. Code Cong. & Admin. News 3668, at 3675), but there are numerous other similar references in the historical documents that cannot be reconciled with a holding that an individual or his personal automobile should be treated as a "point source". E.g., U.S. Code Cong., supra, at 3710 (refers to the application of technology to "industrial point sources"); id. at 3723 (stating that the new "sources" of pollution in twenty-eight specified industries are to be constructed to meet "no-discharge" limitations if possible, and then identifying industrial "groups" such as pulp and paper mills, paperboard industry, meat product processing, dairy processing, rubber processing, etc.); id. at 3728 (discussing how the "owner" of an "effluent source" should install monitoring equipment); id. at 3737 (discussing permits, and indicating that the Act will allow the Administrator to establish "classes and categories of point sources" for which no permit-by-permit review will be undertaken); and id. at 3736

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[21](...continued)
or operator of a point source" to establish and maintain records, make reports, install monitoring equipment, and do a variety of other things that make no sense when applied to an individual who pollutes.

(citing studies that reveal that there are at least 40,000 industrial sources of discharges into the navigable waters). (Of course, if every vehicle owned by an individual were counted, there would be many, many more than 40,000 sources.) Further, the regulations of the EPA themselves are consistent with the view that the federal regulation concerns various identified industries (as noted in the footnote below) and demonstrate the Agency's understanding that the Act regulates industries, not individual persons.[22]

In accord is this Court's discussion of the Act in E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977). That case involved an issue of regulation of "point sources" that existed on the effective date of the 1972 Clean Water Act, which were to be subject to certain limitations, and of "new sources" (those to

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[22] E.g., 40 C.F.R. § 469.10 et seq. (Electrical and electronic components point source category); 40 C.F.R. § 403.1 et seq. (General pretreatment regulations for existing and new sources of pollution); 40 C.F.R. § 420.01 et seq. (Iron and steel manufacturing point source category); 40 C.F.R. § 433.10 et seq. (Metal finishing point source category); 40 C.F.R. § 463.1 et seq. (Plastics molding and forming point source category).

The EPA has taken other action to show its understanding that "point sources" intended to be covered are standing facilities. Thus, as reported in the Environmental Reporter, 19 Env. Rptr. 1908 (January 27, 1989), the EPA proposed a rule directing States to draw up lists of contaminated waterways and "sources" as a measure under the 1987 amendments to the Clean Water Act, which require States to identify waterways with toxic contamination and to identify sources of that contamination. Plainly, it was contemplated that the State would be identifying fixed plants, not movable cars. To the extent that the definition of "point source" in the statute includes "rolling stock" or other "conveyances", we suggest that what Congress meant to cover were conveyances such as railroad equipment within some "confined" location which is a regular part of that facility.

be constructed later), which under the Act were to be limited more strictly.[23] In the course of the opinion, Justice Stevens discussed various terms of the Act in a way that makes it plain that "point sources" involve structures -- such as those mentioned in the definitional section of the Act -- within some plant or location that is "confined" -- one of the operative terms in the definition of "point source". See 430 U.S. at 117 n.4.[24] Indeed, Justice Stevens, in his discussion of the issues, substitutes the term "classes of plants" for "classes of point sources", thus indicating that a fixed plant is the minimum required for a "source" to be a "point source".

Obviously, there is no "class" of sources that is defined -- or that could reasonably be defined -- as cars driven to bulkheads by individuals carrying "pollutants" (a term which

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[23] 33 U.S.C. § 1316(c), quoted at 430 U.S. at 120 n.8, thus states that

> [a]fter the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

The statute obviously does not speak to how one's private vehicle is "operated", but rather connotes a "facility" and its various pollution-discharging parts.

[24] The Court also noted, 430 U.S. at 120, that the Administrator was directed by the Act to publish within 90 days "a list of categories of sources discharging pollutants". To the extent that the statute leaves it to an agency to further define the meaning of one of its criminal terms, there can be no proper finding of criminal liability where, as here, the Administrator has never defined as a "point source", prior to indictment, whatever entity the indictment alleges as a point source. That would hardly be notice.

includes just about anything other than pure water). The mere fact that the pollutants carried at one time in the automobile were traceable to a business and the "source" was thereby in fact "identified" as a "waste-generating activity" (to use the limiting principle fashioned by the district court but nowhere found in the statute) -- or that the individual who polluted was disposing of "industrial [or] municipal waste" and not "litter" (to use Judge Oakes' legislative effort) -- does not turn one's automobile into a "point source". The government's construction that would include a human being within the Act only at some times, depending on how one classifies the "waste" he carried to or near a navigable waterway, is a distinction not made within the statute itself and one that is at war with the language and history of the Act. A "point source" is not defined by the nature of the pollutant.[25]

Nor does any case cited by the government, or any other case for that matter, compel a conclusion that Mr. Villegas or his car can properly be characterized as a "point source". Though the government argues that the decision below "conflicts with decisions from other circuits, which have recognized that the plain language of the Act embraces a broad array of polluting

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[25] To the contrary, the "litter" of human beings is more like rain runoff -- the prime example of a non-point source -- than a point source. Generally, the source of such litter is not readily identifiable.

Even if a "litterer" can be identified, with the Act as it now stands, Congress left it to the States to impose penalties.

conduct that is logically indistinguishable from respondent's activities" (Petition at 15), the government is wrong: no case deals with individual pollution or holds an individual or his personal vehicle a "point source". To the extent that courts -- such as the Court in Earth Sciences, supra, 599 F.2d 368 -- have employed broad dicta concerning the "breadth" of the term "point source" because of the goals of the Clean Water Act, the holding of the case is not entirely inconsistent with this case, because it does not deal with individual pollution as does this case. No one comparing the decision in this case with that in Earth Sciences -- a case in which certiorari was apparently not sought in this Court and the holding of which has been criticized in any event -- should be confused by the actual reach of the statute. One who reads the Second Circuit decision in this case and compares it to any of a number of prior cases that used broad dicta but did not adequately analyze the issue, will know that, to the extent they seek to hold individuals responsible for pollution, they should go to the State authorities or seek an amendment of the statute from Congress.[26]

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[26] As the Second Circuit majority realized, most of the prior civil cases do involve "conveyances" in fixed ("confined") locations, thus giving no basis to reach the conclusion that a broad construction covers the conduct at issue. E.g., Avoyelles Sportsmen's League v. Marsh, 715 F.2d 879, 922 (5th Cir. 1983) (bulldozing equipment discharged dredged materials into wetlands as part of a fixed agricultural activity). To the extent that the cases suggest a broader reach, they were not decided in a criminal context, where the rule of lenity applies.

Nor does the Court of Appeals decision suggest, as the government claims it does (Petition at 16), that "the same

(continued...)

Congress may now think that it has the powers to penalize individual polluters of the waters and may wish to use those powers, but either it did not think so at the time it enacted the Clean Water Act, or decided that the States should be responsible for such pollution. In any event, Congress certainly did not plainly include conduct such as that of Mr. Villegas in the Act's coverage; had it wished to do so, it would have, and should have, stated succinctly: "Any person who pollutes the navigable waters by placing pollutants in those waters without a permit is guilty of a crime." This plain forewarning was not given because it was not what Congress meant to cover when it enacted the "point source" regulations in the Clean Water Act. See United States v. Campos-Serrano, supra, 404 U.S. at 299 ("The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute.") The government's remedy in this case is not with this Court: it is with Congress.

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[26](...continued)
statutory language" should be interpreted "differently depending on the civil or criminal nature of each particular case". Aside from the fact that the cases it cites do not support the proposition that interpretation of the criminal statute should not be undertaken with less "flexibility", the Court of Appeals' decision only reflects the fact that, where a statute has criminal application, as here, the rule of lenity must be invoked when one reaches a place where two interpretations both make sense. This, indeed, is the same theory as applies to issues of whether a court should sustain an agency's own interpretation of a statute. See Gorsuch, supra, 693 F.2d 156 (D.C. Cir. 1982) (upholding EPA's decision that dams were not point sources because both sides' interpretations were reasonable and the law requires deference to an agency's determination when that is so).

CONCLUSION

The Supreme Court has no need to take this case. If the prosecutors are not happy with the result, their remedy is to seek an amendment of the Act from the Congress of the United States. A writ of certiorari should not be granted.

Dated: Mt. Kisco, New York
May 31, 1994

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No. 93-1572

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GERONIMO VILLEGAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent does not dispute that he loaded his car with vials filled with human blood, some of which were contaminated with the hepatitis-B virus, that he drove his car to the banks of the Hudson River, and that he then took the vials out of the car and disposed of them in the navigable waters. Respondent likewise does not dispute (Br. in Opp. 24) that his conduct is covered by the Clean Water Act if that conduct is "any addition of any pollutant to navigable waters from any point source"—*i.e.*, from "any discernible, confined and discrete conveyance." 33 U.S.C. 1362(12) and (14). Respondent contends, however, that "a personal automobile" is not a "conveyance." Br. in Opp. 24-25, 27. In the alternative, he contends that the discharge did not occur "from" the automobile, but

"from" his hand. Br. in Opp. 25. Those claims are so inherently implausible that they simply highlight the error committed by the Second Circuit.

2. Respondent claims that "a personal automobile" (Br. in Opp. 24) is not a "conveyance," because the Clean Water Act purportedly is directed only to "*fixed* outlets of pollutants at *fixed* industrial or municipal plants." See Question Presented in Br. in Opp. (emphasis added). The notion that a car—personal or otherwise—is not a "conveyance" is so flatly contrary to the ordinary understanding of English that anyone advancing it bears a special burden of justification, which respondent's extended discussion of the general purposes of the Act (Br. in Opp. 29-36) simply does not provide.

In ordinary parlance, a conveyance is "a means of transportation," *Webster's Third New International Dictionary* 499 (1986), or "a means or way of conveying * * * or passing (as from place to place)," *ibid.*, and therefore the term most certainly includes an automobile. The Act itself confirms that that ordinary meaning is intended, since it gives a non-exhaustive list of covered "conveyance[s]," including "container[s]," "rolling stock," [*i.e.*, a railroad's wheeled vehicles], and "vessel[s] or other floating craft." 33 U.S.C. 1362(14). The Act thus directly refutes respondent's attempt to limit the "point source" concept to "fixed" outlets of pollution at "fixed" industrial or municipal plants.

That conclusion is not changed by respondent's observation (Br. in Opp. 32-33 & n.21) that *other* provisions of the Act impose certain requirements on "point sources" that appear to contemplate that those requirements will be imposed on industrial plants.

The term "point source" is expressly defined by the Act; a point source is "*any* discernible, confined and discrete conveyance." 33 U.S.C. 1362(14) (emphasis added). Since the "point source" concept is defined in the Act, there is no reason to seek its meaning from the various contexts in which "point source" is used in the Act. Moreover, the inapplicability of the full range of statutory provisions to a given conveyance is not a reason for concluding that the conveyance is *never* a "point source." Cf. *United States* v. *Turkette*, 452 U.S. 576, 585 (1981) (the fact that some provisions of RICO do not apply to all RICO enterprises does not mean that those entities are not "enterprises").

3. Respondent alternatively contends (Br. in Opp. 25) that "even if a personal automobile could be deemed a 'point source' * * * the conduct would still not be within the Clean Water Act[,] because respondent took the vials out of the car before they came anywhere near the navigable waters." That fact leads respondent to claim that his continuous conduct in dumping the vials from the car into the water was not a discharge "from" the car, but only a discharge "from" his person. As petitioner notes (Br. in Opp. 25-26 & n.14), the Second Circuit implicitly took that view, which then made it necessary for that court to decide whether a human being can be "a point source" under the statute.[1] The court of appeals, however,

[1] While the court of appeals devoted the bulk of its opinion to the question whether a human being can be a point source, and resolved that issue erroneously, this Court need not reach that question unless it agrees with respondent's claim that the blood vials were not added to the water "from" his car. If the Court were to so conclude, respondent would be entitled to a judgment of acquittal only if the Court *also* concludes that a

erred in believing that there was no discharge "from" respondent's automobile.

In ordinary parlance, the preposition "from" is "used as a function word to indicate a starting point: as * * * a point or place where an actual physical movement (as of departure, withdrawal, or dropping) has its beginning." *Webster's Third New International Dictionary* 913 (1986). It is perfectly sensible to speak of respondent's car as the "starting point" of the "physical movement" of the vials to the water. Indeed, while a particular contextual use may indicate that a more limited meaning is intended, nothing in the ordinary meaning of the preposition "from" necessarily requires that it be confined to a *single* starting point. One would ordinarily say that an object fell to the ground "from" the top of a ten-story building even if the object hit one of the awnings on its way down, and even if it would also be accurate to say in those circumstances that the object fell "from" the awning. Similarly here, it is quite accurate to say that the vials filled with human blood were added

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human being can *never* be a "point source." If a person can be a "point source," and we contend that the district court was correct to conclude so (Pet. App. 38a-39a), respondent's convictions must be affirmed. Contrary to respondent's claim (Br. in Opp. 13-14), the general rule that a conviction may not be affirmed on a theory not presented to the jury, see *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980), does not help him here, because no jury that found respondent guilty on the theory that his car was the "point source" could fail to convict him on the alternative theory—*i.e.*, the jury already necessarily found that respondent threw the vials in the water. Thus, failure to advise the jury that respondent was the "point source," if that was required, was harmless beyond a reasonable doubt. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 501-504 (1987).

to the water "from" respondent's car, even if it would also be accurate to say that the vials were discharged "from" respondent's hand. Respondent therefore is quite wrong to suggest (Br. in Opp. 25-26 & n.14) that by using the word "from" the Act necessarily requires that the pollutant enter the water *directly* from the point source (here, presumably, by being pitched *by hand* directly into the water from within the car).

Respondent's contrived interpretation of the word "from" derives no support from *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), on which he heavily relies. See Br. in Opp. 26-27. The issue in that case was whether the Environmental Protection Agency was required to regulate under Section 402 of the Act certain changes in water quality that occurred naturally in certain dams, such as a low level of dissolved oxygen in the deep strata of reservoirs as a result of their being too deep to be aerated by wind.[2] The court upheld the agency's view that there was no *addition* of a pollutant from a point source when the purportedly polluted water passed through the dam (a point source) "into the formerly unpolluted river below." 693 F.2d at 174-175. Because the "pollutants" were already present in the navigable waters, there was simply no "*addition* from a

[2] Because it involved Section 402 of the Clean Water Act, the issue in *National Wildlife Federation* differed from the issue recently addressed by this Court in *Jefferson County PUD* v. *Ecology Dep't*, No. 92-1911 (May 31, 1994). *Jefferson County PUD* involved Section 401 of the Act, which requires state water quality certification for any federal permit applicant whose activities may cause "any discharge into the navigable waters" whether by pollutants *or otherwise*.

point source [which] occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175 (emphasis added). Thus, *National Wildlife Federation* simply did not address, much less endorse, the proposition for which respondent cites it; it merely held that the dam could not be deemed to have "added" to the water what was already in the water before the water passed through the dam. By contrast, the blood vials that respondent discharged from his car into the water did come "into [the] water from the outside world." *Ibid.*

4. Respondent fares no better in his attempt to distinguish cases from other courts of appeals, in which those courts have recognized that the Act embraces conduct that is indistinguishable from his own. For example, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 922 (5th Cir. 1983), held that bulldozers and backhoes used to discharge pollutants into navigable waters were "point sources." Without pointing to any language so indicating, respondent simply avers that the case turned on the fact that the bulldozers and backhoes were used "as part of a fixed agricultural activity." Br. in Opp. 37 n.26. In respondent's view, a bulldozer used in agriculture may be a "conveyance," but a personal automobile used to discharge wastes from his (presumably "fixed") commercial blood-testing laboratory is not. The logic of that distinction is, to say the least, elusive.

Respondent's discussion of *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), is similarly unpersuasive. Respondent suggests that *Earth Sciences* "is not entirely inconsistent" with the decision below, because it did not deal with pollution by an

individual. Br. in Opp. 37. The key point, however, is that the Tenth Circuit's statutory analysis of "point source"—which would cover "any activity that emits pollution from an identifiable point," *Earth Sciences*, 599 F.2d at 373—is certainly broad enough to cover respondent's conduct in discharging pollutants from his car. Respondent also notes that certiorari was not sought in *Earth Sciences*, and that the case "has been criticized in any event." Br. in Opp. 37. If respondent believes that the Second Circuit's ruling in this case vindicates any valid criticism of the Tenth Circuit's approach, that is a reason *for*, rather than against, review by this Court.

5. Respondent also invokes the rule of lenity, claiming that Congress did not "plainly" outlaw his conduct, because it did not enact a statute that told him in *haec verba* that "[a]ny person who pollutes the navigable waters by placing pollutants in those waters without a permit is guilty of a crime." Br. in Opp. 38. The rule of lenity, however, concerns itself with whether the penal statute that Congress actually passed is ambiguous, not with whether defendants might wish to improve on legislative draftsmanship by positing a statute more to their liking. The Clean Water Act clearly prohibits discharging pollutants without a permit from "any discernible, confined and discrete conveyance." 33 U.S.C. 1362(14). That respondent can claim that he did not violate the Act principally by contending that his car is not a "conveyance" gives a fair measure of just how insubstantial his claim of ambiguity truly is.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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